

LAWLER, METZGER, MILKMAN & KEENEY, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

GIL M. STROBEL
PHONE (202) 777-7728

PHONE (202) 777-7700
FACSIMILE (202) 777-7763

January 6, 2006

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Telecommunication Relay Services and Speech-to-Speech Services for
Individuals with Hearing and Speech Disabilities – CG Docket No. 03-123
Written Ex Parte*

Dear Ms. Dortch:

Attached for inclusion in the record of the above-referenced proceeding is a presentation by Sorenson Communications, Inc. ("Sorenson"), entitled "Regulating VRS Hardware and Software is Contrary to the Intent of Section 225 and to the Interests of the Deaf Community."

Sincerely,

/s/ Gil M. Strobel
Gil M. Strobel

Attachment

cc: Scott Bergmann
Michelle Carey
Thomas Chandler
Monica Desai
Aaron Goldberger
Jay Keithley
Jessica Rosenworcel

**REGULATING VRS HARDWARE AND SOFTWARE IS
CONTRARY TO THE INTENT OF SECTION 225 AND
TO THE INTERESTS OF THE DEAF COMMUNITY**

**A Presentation by
Sorenson Communications, Inc.**

January 6, 2006

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REGULATING VRS HARDWARE AND SOFTWARE IS CONTRARY TO THE INTENT OF SECTION 225 AND TO THE INTERESTS OF THE DEAF COMMUNITY

I. OVERVIEW

Regulating the hardware and software design behind Sorenson's Video Relay Service ("VRS"), or any other provider's VRS, will produce results that are contrary to the central intent of the Americans with Disabilities Act ("ADA") and section 225 of the Communications Act of 1934, as amended. Those statutes require, *inter alia*, that the Federal Communications Commission ("FCC" or "Commission") fund the creation of services that provide functional equivalence between two types of communication: (1) communication between any deaf person using American Sign Language ("ASL") and any hearing person who does not use ASL, and (2) spoken communication between two hearing people. For VRS, the functional equivalent of hearing-to-hearing communication is created when the interpreter signs through a visual medium to the deaf person and simultaneously speaks through an auditory medium to the hearing person. The act of interpretation in these two different media creates the functional equivalent of hearing-to-hearing communication. Interfering through regulation with the technology that enables effectively simultaneous, clear visual communication and clear auditory communication is not the purpose of Section 225. That statute is not directed at managing competition among VRS providers or adjusting the experience of ASL users to suit the wishes of some but not all such providers. It is directed at making the functional equivalent of hearing-to-hearing communications available to all ASL users in the United States.

Sorenson has invested more than \$50 million to create the best technology platform for its authorized interpreters to provide functional equivalence. It has spent a great deal of money to distribute that platform to deaf people. It leads all VRS providers in the quality and reach of its solution. However, VRS is in its early days. Less than 10 percent of deaf people currently have access to VRS – whereas nearly 100 percent of hearing people can communicate with each other over the telephone.

The Congressional purpose of Section 225 is to improve and distribute VRS to the full extent of the need. Sorenson's competitors have focused instead on getting the FCC to regulate the software and hardware of the Sorenson platform. They want to use Sorenson's investment and know-how without paying anything for it. They make outdated assertions about Sorenson allegedly blocking incoming calls – without acknowledging that VRS rivals currently connect their interpreters to Sorenson users through the Sorenson videophone, without any interference by Sorenson. What competitors call "blocking" is just Sorenson connecting the VP-100 to an interpreter to provide a service that is functionally equivalent to hearing-to-hearing calls. The regulations these rivals seek would jeopardize Sorenson's ability to vouch for the quality and reliability of the actual functional equivalence – the interpreter's simultaneous signing and speaking to the linked ASL and hearing persons. They have asked the FCC to engage in precisely the sort of micromanaging regulation that this Commission has disavowed with respect to every other broadband technology, all cellular phone networks, and every other innovation being rolled out in market-based ways to all Americans today. While the competitive zeal of every VRS provider is to be encouraged, Sorenson's rivals ought to direct their energy at fairly

representing their services to the community of ASL users and to hearing people who want to communicate with them, and in so doing promote the statutory purpose of section 225 by propagating their own solutions to the challenge of functional equivalence, instead of attacking Sorenson's legitimate and praiseworthy success.

Unless the FCC engages in the unnecessary and counterproductive regulation sought by Sorenson's competitors, more firms will enter into the VRS business and more technological innovation to provide functional equivalence will be introduced. The most efficient solutions will prevail over time, and a functionally equivalent service will be made available to all ASL users, just as section 225 states as its goal. What Sorenson's competitors want would thwart Congressional intent, and would be contrary to the Commission's philosophy in all its current market-based approaches to new communications services. Sorenson's competitors have failed to demonstrate that Congress has conferred on the FCC the authority necessary to impose intrusive regulations on VRS customer devices in the manner they propose. In fact, such regulation would frustrate the FCC's ability to perform the very duties that Congress affirmatively imposed on the FCC in section 225 – namely, ensuring that regulations prescribed to implement that statute encourage the use of existing technology and do not discourage or impair the development of improved technology. Moreover, it is inappropriate to invoke functional equivalency unless there is at least one function that a voice service provides for which an “equivalent” is lacking in a relay service. Sorenson's rivals have not identified, and Sorenson is not aware of, even a single voice service that includes a function that gives customers discretion to place outbound calls via a competing provider of the same service. Accordingly, Sorenson's rivals cannot plausibly claim that section 225, whether by itself or in conjunction with the FCC's ancillary jurisdiction, authorizes the Commission to adopt the regulations sought by Sorenson's competitors. Therefore, the Commission should not issue the order requested by Sorenson's rivals and should instead focus its efforts on developing a ratemaking methodology that will promote more rapid dissemination of VRS functional equivalence to the unserved ASL community of the United States.

The statutory purpose of section 225 is just beginning to be accomplished. Sorenson, through its hard work in providing installers, interpreters and new technology, has helped make VRS available to many more ASL users than would otherwise have had access. However, only about 10 percent of all ASL users currently have access to any VRS provider. Many providers are in the market, but the group as a whole has scarcely penetrated the ASL community.

There is still a long way to go to achieve 100 percent accessibility even by the end of this decade, and thereby make it possible for all ASL users to be integrated more fully into their communities and the U.S. economy. VRS is still a nascent industry and penetration is still very low. Attaining 100 percent accessibility will require continued investment and innovation by Sorenson and other VRS providers. And that process will continue only if the FCC promotes the usage of VRS by adopting policies that foster innovation. In no event should the FCC impose onerous requirements on VRS providers that create disincentives for investment or otherwise impede the spread of VRS.

Adopting the regulations sought by Sorenson's competitors would discourage innovation. Such regulations would deter investment and slow penetration of VRS among ASL users, suppressing the availability of functionally equivalent services to deaf people. Moreover, the

regulations proposed by competitors are completely inconsistent with the policy choices that the Commission has made with respect to wireless, direct broadcast satellite ("DBS"), instant messaging, and other communications services, and those policy choices should apply to VRS as well.

* * * * *

The remainder of this paper is organized as follows:

- Section II describes the purpose of section 225 and explains why the proposed regulations are contrary to that purpose.
- Section III explains that Sorenson users can make calls to – and receive calls from – any hearing or deaf person and describes the problems that would arise if competitors' proposals were adopted.
- Section IV describes how competitors' proposals would harm the deaf community by limiting innovation and could interfere with access to emergency services.
- Section V demonstrates how competitors' proposals are inconsistent with the FCC's prior precedents.
- Section VI shows that Sorenson's actions are consistent with all applicable statutes and regulations.

II. COMPETITORS' PROPOSALS ARE CONTRARY TO THE PURPOSE OF SECTION 225

Section 225 requires the FCC to ensure that relay services are "functionally equivalent" to voice communication services provided to hearing users.¹ Sorenson's competitors repeatedly claim that this directive requires the FCC to compel Sorenson to permit subscribers to use the VP-100 to place outbound calls via VRS providers other than Sorenson. This claim is without merit. It is axiomatic that the first step in statutory construction is to look at the plain meaning of the statute.² In this case, "equivalence" clearly requires the comparison of two things: relay services provided to the hearing impaired; and voice services provided to the hearing. VRS cannot be deemed "equivalent" in the abstract, but only can be judged as "equivalent to"

¹ 47 U.S.C. § 225(a)(3).

² *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987); see also *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'") (quoting *Caminetti v. United States*, 241 U.S. 470, 485 (1917)).

something else.³ Under section 225, the “something else” to which VRS must be functionally equivalent is voice services. To invoke functional equivalence under section 225, therefore, there must be at least one function that a voice service provides that a relay service lacks. It is not enough to vaguely suggest or surmise that such a voice function exists: If the FCC is unable to identify with specificity such a function, it may not adopt regulations pursuant to the functional equivalency mandate of section 225.

Their rhetoric notwithstanding, Sorenson’s competitors have not identified even a single wireline or wireless voice service for which the provider of the service is required to provide a function that gives customers discretion to place outbound calls via a competing provider of the same service. That is because no such voice service exists. A local exchange carrier (“LEC”) is not required to permit its customers to place a local exchange call via another LEC, for example. Nor do customers of one wireless carrier have discretion to use that carrier’s service or devices to place calls via another carrier’s wireless service. Absent a showing that relay users are being deprived of a function provided to hearing users, the Commission may not rely on the functional equivalency mandate of section 225 to impose the type of regulation sought by Sorenson’s competitors.

A. One of the Primary Goals of Section 225 is to Encourage the Development and Deployment of Technology Designed to Create Functional Equivalency

Congress has explicitly stated its desire to encourage the development of new technologies and services, including those used by persons with disabilities. Section 225(d)(2) of the Act requires the Commission to ensure that the regulations prescribed to implement section 225 “encourage, consistent with section 7(a) of this Act, the use of existing technology and do not discourage or impair the development of improved technology.”⁴ Section 7(a), in turn, states:

It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.⁵

Sorenson has developed an innovative total service platform that has greatly improved communications for tens of thousands of deaf and hard-of-hearing persons. As described below, Sorenson’s service includes high-quality video images tailored to the specific needs of ASL users; highly-trained interpreters; and unlimited point-to-point calling, as well as numerous other innovations and benefits. This service is precisely the type of innovation that Congress sought to promote in promulgating section 225 of the Act.

³ Equivalence is a relational attribute that can be found to exist only after two things have been compared. *See, e.g., Webster’s Third New International Dictionary* 461 (1993) (listing “equivalent” as a synonym for “comparable”).

⁴ 47 U.S.C. § 225(d)(2).

⁵ 47 U.S.C. § 157(a); *see also* § 706, 47 U.S.C. § 157 note.

Nonetheless, some parties in this proceeding have asked the Commission to force Sorenson to forego the benefits of its innovation by requiring it to break apart elements of its service and offer them piecemeal in a manner that benefits Sorenson's competitors but inhibits future improvements in VRS.⁶ As explained in Section VI below, those arguments are uniformly devoid of legal merit and often are premised on a faulty understanding of the facts. Moreover, those who would have Sorenson dismantle its platform have failed to carry their burden of demonstrating that their scheme – misleadingly couched as an “interoperability” requirement – would serve the public interest. Proponents of unbundling requirements for VRS ignore the fact that the industry is currently functioning smoothly and providing deaf users with increased choices and innovative products. In addition, it is clear that users of any VRS provider can reach anyone and be reached by anyone using any other VRS provider.⁷

Unnecessary government regulation of the sort sought by Sorenson's competitors will only hurt deaf users by chilling innovation and robbing them of some of the most desirable features that Sorenson has brought, and would continue to bring, to the deaf community in the absence of government interference. The intrusive regulations currently under consideration would deprive providers of the ability to define and differentiate their service offerings and control the quality of their services. The proposed regulations also would limit providers' ability to recover the investments they make to improve their service. Such results would directly contradict the mandates of sections 225 and 7(a). The biggest losers under such a scheme would be the deaf and hard-of-hearing community – the very group that section 225 seeks to protect.⁸ It defies logic to claim that regulations that would undermine the explicit mandate of section 225 are somehow authorized by that statute.⁹

⁶ This remedy would allow Sorenson's competitors to receive compensation from the Interstate Telecommunications Relay Service (“TRS”) Fund for VRS calls placed through equipment developed at great risk and expense by Sorenson, without providing any compensation to Sorenson itself. *See, e.g.,* Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, FCC Secretary (Dec. 23, 2005) (“Hamilton Dec. 23 *ex parte*”) (urging FCC to require Sorenson to permit users of Sorenson equipment to place calls through non-Sorenson interpreters, but not proposing that Sorenson should be compensated for such calls). (Unless otherwise indicated, all comments and *ex parte* presentations cited herein were filed in CG Docket No. 03-123.)

⁷ The essence of VRS is being connected to an interpreter. The call-by-call choice advocated by competitors would be akin to requiring one long distance provider to provide the customer with access to a second long distance provider in order to place an outgoing call.

⁸ As explained in more detail below, Sorenson's commitment to providing total service includes providing training and high-quality service (due to its more complete control of calls) and addressing maintenance and repair issues. This translates into the most functionally equivalent service available to hearing-impaired consumers.

⁹ The rule proposed by Hands On in a recent filing, for example, invokes section 225 in an effort to induce the FCC to micromanage the equipment used to provide VRS, regulate the specific contours of providers' service offerings and interfere with the contractual relationships between providers and subscribers. *See* email from G. Lyon, Counsel for Hands On Video Relay Services, Inc. to Thomas Chandler, FCC, *et al.* (Dec. 19, 2005) (“Hands On Dec. 19 email”).

Similarly, any suggestion that the Commission could adopt the proposed regulations pursuant to its “ancillary jurisdiction” under Title I of the Act is equally misplaced and ignores the long line of precedents recognizing that the FCC’s authority to exercise such jurisdiction is significantly “constrained.”¹⁰ It is clearly established that “[t]he FCC, like other federal agencies, ‘literally has no power to act . . . unless and until Congress confers power upon it.’”¹¹ As the D.C. Circuit has explained, a critical corollary of this principle is that the FCC may exercise ancillary jurisdiction only if the proposed regulation is “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”¹² None of Sorenson’s competitors has identified the specific “statutorily mandated responsibility” to which their proposed regulations would be “reasonably ancillary.” One thing is clear, however: The relevant “mandated responsibility” cannot be found in section 225 of the Act. As noted, that section is quite clear regarding the central responsibility that the FCC is mandated to perform: “The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 7(a) of this Act, the use of existing technology and do not discourage or impair the development of improved technology.”¹³ As explained above, the FCC’s ability to achieve these goals would be frustrated if it were to adopt the regulations proposed by Sorenson’s competitors. The FCC, therefore, may not plausibly claim that adoption of those regulations is “reasonably ancillary” to its effective performance of duties mandated by section 225 of the Act.¹⁴

None of these actions is authorized, much less mandated, by section 225. To the contrary, these actions would undermine the FCC’s prior approach of “permit[ting] market forces, not the Commission, to determine the technology and equipment best suited for the provision of VRI, and allow[ing] for the development of new and improved technology.” *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, ¶ 23 (2000) (“2000 Improved TRS R&O”).

¹⁰ *American Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

¹¹ *Id.* at 698 (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)).

¹² *Id.* at 692, 700, 701.

¹³ 47 U.S.C. § 225(d)(2).

¹⁴ The fact that VRS providers receive reimbursement from a federal fund does not change the analysis. The purpose of the TRS Fund is to promote the goals of section 225. Contrary to the suggestion of certain parties, therefore, the FCC may not rely on the existence of federal funding to justify adopting regulations that are contrary to the very purpose of the statutory provision that requires the federal funding in the first place. *Cf.* Letter from Karen Peltz Strauss, Consultant to Communication Service for the Deaf, Inc., to Marlene Dortch, FCC, at 2 (Dec. 15, 2005) (“Hamilton *et al.* Dec. 15 *ex parte*”).

B. The Current Regulatory Scheme Has Led to the Rapid Development and Deployment of VRS, With Sorenson Leading the Way

Before Sorenson entered the market, there were several companies offering VRS. Most of these companies provided service over a personal computer, web camera, and software such as Microsoft's Netmeeting. The quality of the image – which is essential to successful visual communication – was poor. The motion was jerky (typically only 15 frames per second), the screen resolution was low, resulting in maximum viewable images of only 3 by 3 ½ inches, and users had to boot up their computers to make or receive calls.

When Sorenson introduced its service in April 2003, it offered VRS users a much higher quality service, and ASL households responded by adopting VRS in increasing numbers. Sorenson VRS uses Sorenson's innovative video-compression technology to provide greatly improved image quality. The motion is smooth (typically 30 frames per second) and screen resolution is high, allowing for full-screen images without significantly degrading image quality. Rather than requiring the use of a computer with a web camera, Sorenson VRS relies on the innovative VP-100 videophone to display images on a user's television set.¹⁵ Sorenson has tailored its service to the specific needs of ASL users by, for example, providing superior resolution in the part of the picture where callers' hands usually appear so that signing is easier to decipher. Sorenson has also developed technology that allows subscribers to use videophone numbers instead of IP addresses to receive incoming VRS calls from other Sorenson customers.¹⁶ Users like the large screen and the clear picture,¹⁷ as well as the convenience of being able to

¹⁵ Consumers that prefer not to take advantage of the VP-100 may use other means, including the award-winning i2eye videophone, to access Sorenson's interpreters. See "D-Link's i2eye VideoPhone Wins Electronic House's Product of the Year," *available at*: <<http://www.dlink.com/products/DVC-1000/electronicHouseAward.asp>>. The i2eye videophone offers many of the same features as the VP-100 and may be used to place calls with any VRS provider. The VP-100, however, offers additional features and is provided as part of the total Sorenson service. See "Sorenson VRS Frequently Asked Questions," *available at*: <<http://www.sorensonvrs.com/what/faq.php>>. Consumers can choose to buy the i2eye, or VRS providers can supply them to customers, just as Sorenson provides the VP-100.

¹⁶ The common industry standard for all video devices is the IP address, and Sorenson's VP-100 adheres to this standard. However, for the convenience of its customers, Sorenson has devised a way to translate pseudo "phone numbers" into IP addresses in a way that is transparent to end users. Thus, from the user's point of view, Sorenson's technology appears to enable the use of a phone number to place VRS calls to VP-100 users via Sorenson's interpreters, as well as point-to-point calls between Sorenson subscribers.

¹⁷ See, e.g., "New Videophone Hailed as Breakthrough for the Deaf," Thomas J. Fitzgerald, *Forbes.com* (Jan. 5, 2004), *available at*: <http://www.forbes.com/2004/01/05/105videophonepinnacor_ii.html> (citing Ronald Burdett, dean of deaf studies at Ohlone College in Fremont, California and Genie Gertz, assistant professor of deaf studies at California State University at Northridge as "prefer[ing] the Sorenson videophone to PC-based Webcam systems because the screen is larger and the picture is clearer. It is absolutely amazing the kind of quality that you can get, Burdett said.").

provide hearing people with a “phone number.”¹⁸ With its innovative technology, Sorenson VRS provides users an experience that is functionally more equivalent to traditional voice service than that offered by any other service provider. These innovations are a product of Sorenson’s unparalleled investment in VRS and video technology for the deaf and hard of hearing. To date, Sorenson has spent approximately \$50 million in its efforts to provide its superior service. And Sorenson continues to invest in new technologies and ideas designed to improve VRS users’ experience.

Sorenson’s market-leading innovations have helped – and continue to help – drive VRS industry growth. When Sorenson began offering service in 2003, VRS demand only amounted to approximately 200,000 minutes per month. By March 2005, that figure was up to approximately 1.8 million minutes per month – a 900 percent increase over two years.¹⁹ A significant part of this growth was driven by Sorenson’s high-quality, groundbreaking VRS.²⁰

¹⁸ Petition for Declaratory Ruling on Interoperability of the California Coalition of Agencies Serving the Deaf and Hard of Hearing at 3 & n.3 (Feb. 15, 2005) (“Coalition Petition”) (“Another very popular feature of the device is that it conveniently allows the customer to use his existing phone number as an alias for his Internet Protocol (IP) address,” and as a result “the customer also does not need a static public IP address which requires a more expensive broadband service and which is necessary for users of traditional videoconferencing equipment to receive a video call.”)

¹⁹ See, e.g., NECA Growth Chart, “VRS Minutes January 2002 – Current,” available at: <<http://www.neca.org/media/1105VRSCURRENT.pdf>>; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Access to Emergency Services*, CG Docket No. 03-123, Notice of Proposed Rulemaking, FCC 05-196, ¶ 5 n.18 (rel. Nov. 30, 2005) (“VRS 911 NPRM”), explaining that in January 2003, there were 128,114 minutes of use; in January 2004, there were 477,538 minutes of use; and in January 2005, there were 1,634,316 minutes of use. There were over 2.2 million minutes of use of VRS in July 2005.

²⁰ Although Sorenson has been highly successful, it does not have market power. Some competitors have alleged (without any factual support or legal analysis) that Sorenson is “dominant.” See, e.g., Hamilton Dec. 23 *ex parte*. Dominance is an FCC construct used to analyze common carriers’ market power. Sorenson is not a common carrier. See discussion below at Section VI. Moreover, even if Sorenson were a common carrier, it would not satisfy the conditions that the FCC has historically considered in evaluating dominance. See *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 38 (1995) (the four factors to be considered in determining dominance are: (1) the carrier’s market share; (2) the supply elasticity of the market; (3) the demand elasticity of the carrier’s customers; and (4) the carrier’s cost structure, size and resources.). Nor does Sorenson have market power under a traditional market power analysis. See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 12 FCC Rcd 15756, ¶ 85 (1997) (a firm is deemed to have market power if it has the ability to raise prices of the relevant services, either by restricting its own output of those services, or by increasing its rivals’ costs or restricting its rivals’ output through the control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services).

Sorenson cannot rest on its past successes, however; the VRS industry is still in its infancy and competition moves swiftly. Already there are seven other VRS providers vying for customers, and each VRS user can select services from any or all of these providers: users can reach any provider's service over a high-speed Internet connection and there are no barriers to switching providers. Moreover, the vast majority of deaf ASL users still do not even use VRS, much less Sorenson. Thus, any provider may win customers away from Sorenson by developing a service that surpasses that of Sorenson in image quality, ease of use, or any number of other features that can attract new users that currently use a text telephone ("TTY") or other technologies. Recently, Snap Telecommunications, Inc. ("Snap") filed a letter announcing its plans to enter the VRS business using what it described as a "more advanced, consumer-friendly video phone. Snap will make use of an advanced video phone – the Ojo™ . . . – that is far superior in quality, user-friendliness, performance, and efficiency than anything currently in the VRS marketplace."²¹ To remain competitive, Sorenson is already working on developing an improved videophone, the VP-200, to provide additional features and benefits to users of Sorenson's total video relay service.²² As these developments demonstrate, the current regulatory scheme has been highly successful in stimulating competition among VRS providers, resulting in constantly improving service for the deaf.

C. Many of the Key Breakthroughs in VRS Have Been the Result of Significant Investment and Innovation by Sorenson

Before launching its video relay service, Sorenson was known for innovation in video compression technology, which improved the robustness of video images carried over the Internet. In 2002 Sorenson formed a partnership with D-Link to create videophones, including

²¹ Letter from Frank Buono, Counsel for Snap Telecommunications, Inc., to Marlene H. Dortch, FCC Secretary, Attachment at 3 (July 13, 2005) ("Snap *ex parte*"). The Ojo is currently available to consumers. See "Ojo™ Personal Video Phone," available at: <<http://broadband.motorola.com/consumers/products/ojo/index2.html>>.

²² Thus, although Sorenson carries a large portion of current VRS minutes, it does not exercise "market power" with respect to VRS, as some parties claim. See Coalition Petition at 22; Hamilton Dec. 23 *ex parte*; Comments of Communication Service for the Deaf, Inc. at 28-29 (Apr. 15, 2005) ("CSD Comments"); Comments of Hands On Video Relay Services, Inc. in Support of Equipment Interoperability Requirements at 12-13 (Apr. 15, 2005) ("Hands On Comments"); National Association of the Deaf Reply Comments on Relay Service Interoperability at 8-9 (May 2, 2005) ("NAD Reply Comments"); *Ex parte* presentation attached to Letter from George L. Lyon, Jr., Counsel for Hands On Video Relay Services, Inc., to Marlene H. Dortch, FCC Secretary, at 2 (Nov. 11, 2005) (filed Nov. 14, 2005) ("Hands On Nov. 11 *ex parte*"). Not only does Sorenson face competition from numerous VRS providers, it also must compete against TTY and other more established services that serve the communications needs of the deaf community.

both the VP-100 and the i2eye videophone.²³ All told, Sorenson invested over \$50 million over a period of several years to develop a high-quality, low-cost, and reliable videophone.²⁴

The result of Sorenson's work and investment is a service that provides the greatest degree of functional equivalence yet to the deaf and hard-of-hearing. For example, Sorenson is an industry leader in the provision of 911 and E911 services, ensuring immediate access to emergency communications.²⁵ This is just one example of Sorenson's ongoing commitment to advancing the functional equivalence of VRS by improving the quality of calls to both deaf and hearing parties. Sorenson also provides high-quality video connections²⁶ to interpreters who can facilitate communication with the hearing people. All Sorenson interpreters receive comprehensive training, including several days of intensive classroom instruction on a number of topics at the start of their employment and continued observation and on-the-job training thereafter. Interpreters are also provided ongoing access to additional training, as needed, as well as refresher courses. Sorenson ensures that subscribers do not have to endure long waits before being connected to an interpreter, meeting or exceeding the FCC's speed-of-answer requirements. Sorenson provides customers with installation and maintenance of the VP-100 as well as training for new users. Sorenson's service enables subscribers to call any hearing person through a Sorenson interpreter. Point-to-point calls can be made to other deaf users, regardless of whether they are Sorenson subscribers. Indeed, one of the biggest benefits to deaf users has been a significant increase in deaf-to-deaf calls over the VP-100. These calls constitute more

²³ See "Sorenson Company History," available at: <<http://www.sorenson.com/company/history.php>>. The i2eye videophone is available for sale and is distributed by various VRS providers, sometimes free of charge. See Coalition Petition at 4 n.4; see also "Welcome to D-Link Shop," available at: <http://www.dlinkshop.com/searchresults.asp?search_id=1> (offering the i2eye for purchase).

²⁴ These investments were made in a regulatory environment in which companies were free to structure their service offerings as they saw fit and reap the rewards (or losses) that their investments and business decisions merited. It is far from clear that any company would make similar investments in the future if the FCC were to adopt the invasive regulations sought by VRS providers that have been unable to match Sorenson's success in the marketplace.

²⁵ As explained below, Sorenson has been working to provide a 911 solution for VRS and expects to make it available to other VRS providers. See Section IV below (discussing Sorenson's commitment to emergency communications).

²⁶ The service includes the most advanced videophone available today, the VP-100, as well as access to a Sorenson server and to Sorenson's highly trained interpreters. Although Sorenson's interpreters are accessible without use of the VP-100 (for example, a user can reach a Sorenson interpreter through an i2eye device or a webcam), Sorenson provides the VP-100 free of charge in order to bring its customers the full benefits of Sorenson's service, including high-resolution video displayed on a television screen. See "Sorenson VRS Frequently Asked Questions" (listing features available only on the VP-100, including full screen self view capabilities, redial options and missed call lists), available at: <<http://www.sorensonvrs.com/what/faq.php>>.

than 80 percent of all Sorenson calls. Although Sorenson is not compensated for these calls, they advance the public policy goal of improving communications for deaf people.

The excellence of Sorenson's service is reflected in customer satisfaction surveys, in which Sorenson consistently receives an average rating of 9 out of 10, as well as the high traffic volumes carried over Sorenson's service.²⁷ No other provider has done nearly as much as Sorenson to make VRS an attractive and useful means of communication for the hearing impaired.²⁸

III. SORENSON USERS CAN MAKE AND RECEIVE CALLS TO AND FROM ANY HEARING OR HEARING-IMPAIRED PERSON

Several parties contend that Sorenson is impeding the "interoperability" of VRS. These parties use the term "interoperability" to refer to a number of issues relating to different scenarios involving making and receiving calls using different combinations of equipment and VRS providers' interpreters. This use of a single term to cover a broad range of circumstances is confusing and masks the fact that there is actually an array of issues facing VRS providers and that different issues require different solutions. Any decision the Commission makes in this proceeding should be based on a more precise analysis of the individual issues raised by commenters under the rubric of "interoperability." An important first step is to divide commenters' complaints regarding outgoing VRS calls from those regarding incoming calls to VRS subscribers and examine each set of issues separately.

A. Outgoing Calls

VRS customers currently enjoy a wide range of choices for making outgoing calls.²⁹ There currently are eight VRS providers and any VRS subscriber (including a Sorenson

²⁷ By offering higher quality service, Sorenson VRS has created an influx of new customers, precisely as the Commission intended. *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order on Reconsideration, Second Report and Order, and Further Notice Of Proposed Rulemaking, 8 FCC Rcd 1802, ¶ 24 (1993) ("by compensating TRS providers based on actual relay minutes, those TRS providers who provide excellent service to the public and thereby generate strong demand, will benefit.")

²⁸ Under the current compensation mechanism, Sorenson's sole source of compensation for all of its VRS-related expenditures is the per-minute reimbursement rate set by the FCC. This rate, which is determined annually based on the costs of all VRS providers, is the same for all providers and does not provide additional compensation for providers, such as Sorenson, that provide users with equipment, maintenance, repair and training as part of their overall service. The FCC could, however, encourage further innovation by adopting a rate methodology that allows providers to recover all costs incurred in providing VRS in a stable and predictable manner.

²⁹ In addition, as noted above, Sorenson subscribers can use their VP-100s to receive incoming calls from any VRS provider and to make and receive point-to-point calls that do not involve an interpreter. There are no longer any contractual restrictions preventing Sorenson VRS

subscriber) can become a subscriber of any VRS provider at any time. This freedom to switch providers at any time does not exist for users of many other communications services – including wireless voice and satellite – who often have signed term contracts imposing penalties if they cancel service and switch to another provider before the end of the contract.³⁰

Although Sorenson users are free to make outgoing calls via any VRS provider they choose, customers may not use Sorenson's VP-100 to reach another VRS provider's interpreters. This fact is unremarkable: Just as a Verizon Wireless subscriber cannot use a Verizon cell phone to access Cingular's Commercial Mobile Radio Service ("CMRS"), a Sorenson subscriber cannot use a VP-100 to access another provider's VRS service. More importantly, however, just as a Verizon Wireless subscriber can reach a Cingular subscriber, a Sorenson VRS user can use the Sorenson service to make outgoing calls to any hearing or deaf party served by any VRS provider.³¹

Sorenson has decided to offer users a VP-100 only in conjunction with access to its interpreters.³² Sorenson is not alone in deciding to compete on a platform basis. Hands On, for example, also decided to compete by offering a VRS platform that includes equipment as part of its service.³³ Each competitor should be free to offer whatever service packages it thinks will be

customers from receiving calls over their VP-100s from customers of other VRS providers. Thus, it is possible for Sorenson customers to receive incoming calls from any source and via any VRS provider. As explained below, however, the industry standard for video conferencing is currently the IP address, which can make it cumbersome to reach mass market consumers with dynamic IP addresses.

³⁰ VRS users also enjoy far greater choice than TTY users, who are limited to a single provider chosen by the state. In fact, even hearing users of high-cost services supported by federal funds usually have only one or two service providers from which to choose. VRS is unusual in that customers have subsidized access to a wide range of providers.

³¹ Although Sorenson's competitors emphasize the need for consumer choice, they ignore the fact that Sorenson's users already have the same degree of choice that is provided to hearing users of wireline and wireless telephony. *See, e.g.,* Hamilton Dec. 23 *ex parte*, Att. at 1, 3. Three of Sorenson's competitors purport to identify "several differences between cell phones and VRS" that would justify requiring Sorenson to permit users of the VP-100 to place calls via providers other than Sorenson. Hamilton *et al.* Dec. 15 *ex parte* at 2. As demonstrated elsewhere in this filing, these differences do not in fact justify such intrusive regulation. For example, the fact that VRS (but not CMRS) is federally funded cannot be used as a pretext for imposing regulations that are contrary to the very requirements set forth in section 225 (*e.g.,* encouraging functional equivalence and the use of existing technology and not discouraging the development of improved technology). Likewise, the fact that VRS is subject to mandatory minimum standards that do not apply to CMRS does not permit the FCC to impose a new regulation on VRS that would contravene the express requirements of section 225.

³² *See* Diagram 1, attached.

³³ Like Sorenson, Hands On not only provides video equipment to the customer, but also configures that equipment to prevent it from communicating with the IP address of other VRS providers. *See* "HOVRS Equipment Application" (requiring applicant to certify that he or she

most attractive to consumers. The best way to reach the over 90 percent of deaf consumers that are currently unserved is to continue to offer a broad range of alternatives in an effort to attract new users to VRS.

As explained in more detail below, Sorenson's decision to offer the VP-100 exclusively as part of a total service package that includes the use of Sorenson's VRS is consistent with business practices throughout the communications industry and with FCC precedent – including the Commission's decision in the *AOL-Time Warner Relief Order* governing the provision of instant messaging.³⁴ Indeed, the practice of offering a total service that includes equipment is common in a variety of FCC-regulated businesses.³⁵

Competitors' attempts to force Sorenson to unbundle its VRS platform ignore the many obstacles presented by the proposed regulations. In addition to chilling future innovation in VRS and impeding the deployment of such services in direct contradiction of Congress's mandate, the proposed regulations would also present a variety of technical and operational issues.

Technical and Operational Issues: At one point some parties advocated that the FCC impose a requirement that all video devices be "interoperable." Although "interoperability" is a vague term, these parties seemed to be seeking a rule requiring that all video devices meet a specific, uniform set of standards. Although no party has raised this issue recently, Sorenson notes that requiring uniform standards for all video devices would not be a good use of the Commission's limited resources and would not be in the public interest. Among other things, devising standards for video devices would require the FCC to settle on a particular signaling protocol (e.g., H323, SIP, or another alternative) for establishing video calls and conferences

"plan[s] to use the equipment provide by HOVRS to make video relay calls through the Hands On Video Relay Service"), available at: <<https://secure.hovrs.com/equipment/requestform.aspx>>; Hamilton Dec. 23 *ex parte*, Att. at 4.

³⁴ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee; Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS*, Memorandum Opinion and Order, 18 FCC Rcd 16835, ¶¶ 13-15 (2003) ("*Relief Order*") (permitting AOL to restrict access to its IM database).

³⁵ Providers of VRS are free to market their service as they see fit and can choose to offer total service packages in order to compete with Sorenson. Contrary to Hands On's assertions, such a development would not portend a "balkanize[d]" VRS industry in which "consumers will suffer." Hands On Nov. 11 *ex parte* at 12; see also Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, FCC Secretary, at 1 (Dec. 2, 2005) ("Hamilton Dec. 2 *ex parte*"). Indeed, as explained below, CMRS carriers and end users have thrived as CMRS carriers have integrated equipment and features with their services. See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Service Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets*, Report and Order, 16 FCC Rcd 7418, ¶ 36 & n.110 (2001) ("*Wireline Equipment Order*").

over IP networks, as well as a single video codec (e.g., H263, H264, or some other alternative) for video stream compression. The FCC would also have to determine how many frames per second video devices should be required to process and set standards governing screen size and resolution. To Sorenson's knowledge there currently is not a single regulatory requirement governing these issues. Thus, the FCC would have to expend significant resources establishing specifications governing every aspect of the technical and operational issues related to video devices and the communication between them.³⁶

Even if the Commission did not require uniform standards, but were to require Sorenson to extract the VP-100 from its service offering, that would have negative implications for maintenance and repair. Sorenson's VRS includes maintenance and repair of all elements of its service, including the VP-100 videophone. One consequence of forcing Sorenson to dismantle its VRS platform by extracting the VP-100 and allowing it to be used to place calls via other VRS providers would be that the VP-100 would no longer be part of the Sorenson service. In that case, VRS users would no longer benefit from Sorenson's commitment to maintain and repair the VP-100 as part of its overall commitment to ensure the highest-quality service for its customers. Other arrangements would need to be made for maintenance and repair, perhaps by shifting some or all of the responsibility for maintenance and repair to non-Sorenson VRS providers accessed through the VP-100.

Forcing Sorenson to open its VRS platform to competing providers would also harm deaf users. Sorenson would not be able to control the quality of the interpreters used by other providers or the equipment used by those providers' interpreters.³⁷ The proposed regulations also would lead to less efficient use of interpreters as providers would find it more difficult to predict usage volumes accurately, yet would be required to staff up in order to ensure that they met the FCC's speed-of-answer requirements. Fluctuations in demand would lead to idle interpreters, decreasing interpreter efficiency and increasing costs.

Some parties contend that Sorenson's policy of limiting VP-100 users' access to competing VRS providers may prove problematic in the case of widespread outages or national emergencies. As an initial matter, Sorenson notes that such concerns are farfetched given Sorenson's large network of interpreters and geographically dispersed call centers. Nonetheless, the best way to address concerns about outages or capacity shortages is through agreements with other providers. Sorenson is in the process of negotiating agreements with other VRS providers to provide for appropriate compensation when Sorenson transfers calls from its customers to other VRS providers. At a minimum, these agreements will mitigate any waiting-time issues by ensuring that during peak hours overflow traffic is sent to another provider's network in a timely manner, and will address other parties' concerns regarding network failures or capacity limits. The Commission should ask all industry members to negotiate in good faith to reach agreements that enable VRS providers to use each other's interpreters. The FCC should set a deadline for

³⁶ If the FCC were to apply "interoperability" requirements without imposing specific standards, Sorenson would be forced to open up its service to rivals without any control over key aspects, such as the quality of the picture, interpreter service, connection times or other elements that would affect the experience of VP-100 users.

³⁷ See Diagram 2, attached.

reaching such agreements (*e.g.*, six months) and should refrain from acting on the Coalition's petition pending the completion of those negotiations.

Finally, and most importantly, forcing Sorenson to unbundle its platform would discourage future innovation in VRS and provide a windfall to Sorenson's competitors by allowing them access to Sorenson's equipment without any compensation to Sorenson. As was the case with cellular and other industries, the best path to continued improvements in VRS is through competition. Indeed, competition has already begun to provide – and will continue to provide – VRS users with the same benefits that the FCC's "hands-off" approach has brought to consumers of cellular and instant messaging services.³⁸

B. Incoming Calls

Sorenson treats incoming calls in the same way as other VRS providers do. Sorenson does not block incoming calls. Like other VRS providers, Sorenson seeks to mitigate the cumbersomeness of dialing from one video device to another by providing a number that looks like a phone number, but translates to an IP address. Other VRS providers use names or identification codes rather than numbers, but they are doing exactly what Sorenson is doing: associating unique IDs that can remain constant with IP address that may change. Sorenson should not be punished for trying to make it easier for its customers to receive calls.

There is a certain amount of confusion in the record, particularly with respect to allegations that Sorenson blocks incoming calls, which it does not do. In an effort to promote understanding of the facts, three call scenarios are described below and in the attached diagrams.

Before turning to the call scenarios, it is essential to understand that the IP address has emerged as the common industry standard for connecting different videoconferencing devices. When the most common application for video devices was videoconferencing, and users were typically business customers with static IP addresses, this industry standard worked well. Static IP addresses, by definition, remain constant, and it was not difficult, in a corporate setting, to have videoconferencing devices communicate with each other. However, once mass market applications, such as the VP-100, i2eye and other video phones and web cams, were developed, it became clear that identifying these video devices by IP addresses could be problematic for mass market customers. These customers generally have dynamic IP addresses, which change periodically. Since communication between devices is not possible without identification of the IP address, work-around solutions had to be developed.

Three VRS call scenarios are described below, and the discussion that follows explains how, in each case, the VRS provider uses a technique to make it easier for callers to reach a device identified by an IP address.

³⁸ The Commission has credited its deregulatory approach with fostering the great leaps in subscribership that have characterized the cellular industry. *Wireline Equipment Order*, ¶ 36 (“[W]e note that since the Commission lifted restrictions on bundling cellular service and cellular equipment, sales of cellular telephones and overall subscribership to cellular service have increased dramatically.”).

Scenario One: A Sorenson interpreter sets up a call to a VRS user with a VP-100 at the request of a hearing person. In this scenario, the deaf person likely will have provided the hearing caller the toll-free number used to access Sorenson VRS as well as a “Sorenson videophone number” that looks like a North American Numbering Plan (“NANP”) phone number, but is a number Sorenson uses as a mask for the deaf person’s IP address. The VP-100 periodically updates the Sorenson server with the information needed to match the IP address with the Sorenson number. (See attached Diagram 3.)

Scenario Two: A hearing person uses “Brand X” (non-Sorenson) VRS provider’s interpreter to reach a Sorenson customer with a VP-100. In this scenario, the deaf person likely will have used email or some other means to arrange the call and provide the hearing caller a toll-free number for Brand X VRS provider and either an IP address or some other unique identifier that the VRS provider matches to the user’s IP address. (See attached Diagram 4.)

Scenario Three: A hearing person uses a “Brand X” VRS provider’s interpreter to reach a deaf person using an i2eye videophone. In this scenario, the caller dials a toll-free number to reach a particular VRS provider and provides either the User ID or IP address of the deaf person being called. (See attached Diagram 5.)

To date, it has been left to individual VRS providers to seek solutions to the problems posed by dynamic IP addresses. Providers have addressed the issue in a variety of ways. Sorenson, for example, has developed a technology that allows it to use a videophone number that is associated with each Sorenson user and maps to the IP address of that user’s VP-100. For convenience, many users choose their phone numbers as their unique identifiers. The VP-100 and Sorenson’s server(s) work together to match the unique identifier with the user’s dynamic IP address. When there is a change in the user’s IP address, the VP-100 updates the Sorenson server(s) with the new information. Thus, in Scenario One, Sorenson ameliorates the cumbersome aspect of the current industry standard by setting up a directory that matches pseudo phone numbers (which remain constant) with dynamic IP addresses.

Sprint/CSD relies on a similar system, assigning customers a unique user name or mail extension number that Sprint/CSD uses to route calls to deaf users. Hamilton Relay users are able to select unique user names that can be used to route calls to them over the Hamilton Relay service. Thus, in Scenarios Two and Three, the Brand X VRS provider may be ameliorating the challenges of the IP address as an industry standard by establishing a directory that matches a User ID or user name with a dynamic IP address.³⁹ Like Sorenson’s solution, Sprint/CSD’s and Hamilton Relay’s solutions only work for calls made over their respective networks. Calls made via other VRS providers would still require the caller to know the IP address of the called party’s video device.

Individual users have also developed techniques to obtain an identifier that does not change. First, individual customers can purchase static IP addresses for about \$3 - \$5 per month. Second, consumers can also obtain Domain Name Service (“DNS”) names which mask the IP

³⁹ In many cases, the parties will use email, instant messaging, or some other means to arrange a call. This allows the deaf person to provide the hearing caller with an IP address or another identifier that can be used to place the VRS call.

address. A domain name that resolves to a consumer's dynamic IP address can be obtained through a customer's ISP or through services offered over the Internet.⁴⁰

IV. THE PROPOSED REGULATIONS WOULD LIMIT INNOVATION FOR VRS AND COULD INTERFERE WITH ACCESS TO EMERGENCY SERVICES

A. The Proposed Regulations Would Limit Investment and Innovation

Sorenson's competitors are asking the FCC to regulate the hardware and software Sorenson uses to provide VRS and to interfere with Sorenson's ability to define the service it is offering to end users. Such regulatory intervention would be contrary to the mandates of section 225 and the Commission's general policy favoring deregulation. The current regulatory scheme has provided the proper incentives for Sorenson and others to offer VRS, increase deployment of VRS and improve the quality of VRS. The best way to continue encouraging innovation and investment is for the Commission to maintain its current light regulatory touch and let various providers offer different options.⁴¹ The more options that are available, the more likely that new users will be attracted to VRS.

By contrast, regulations of the sort proposed in this proceeding would discourage innovation by limiting providers' control over their service offerings as well as their ability to recover the costs of the investments made to improve their service. As described in the previous section, Sorenson's ability to offer a high-quality service would be severely undermined if it were forced to break out its equipment and make it available to competing providers. Forcing Sorenson to share its technology with its competitors would all but eliminate any incentive for Sorenson – or any other VRS provider⁴² – to invest in developing new technologies or improving their existing service. Without appropriate incentives, Sorenson would not be able to justify continued investment in its industry-leading technology, including its development of the VP-200.

B. Sorenson Leads the Industry in E911

Contrary to the claims made by some of Sorenson's competitors, Sorenson takes its responsibility to provide access to emergency communications very seriously and is deeply committed to providing E911 services to the deaf and hard-of-hearing. In fact, Sorenson has taken a leadership role in this area – so much so that other VRS providers have asked Sorenson

⁴⁰ See Comments of Sorenson Media, Inc. at 13 & n.21 (Apr. 15, 2005). Web sites providing IP address resolution include <http://www.no-ip.com/services/managed_dns/free_dynamic_dns.html> and <<http://www.dyndns.com/services/dns/dyndns/>>.

⁴¹ The efficacy of this policy was reinforced by the Snap's announcement that it intends to enter the VRS business. Snap's offering will include what it describes as an innovative new videophone that is superior to anything currently being offered to VRS users. See Snap *ex parte*, Att. at 3.

⁴² It is unclear whether Snap, for example, would have expended "considerable resources" in an attempt to enter the VRS business if it thought it would be subject to the regulations being considered in this proceeding. See Snap *ex parte* at 2.

to develop a solution that can be used as an industry standard for all providers. Sorenson accepted this request willingly and has almost completed work on a potential industry standard 911 solution, which it is in the process of presenting to other VRS providers. Sorenson should be compensated, not penalized financially, for its efforts to make emergency services available to VRS users on an expedited basis.

Using its new solution and its ground-breaking VRS, Sorenson will provide the most rapid and highest quality E911 connection of any VRS provider. Recognizing the crucial nature of this endeavor, Sorenson will continue to develop improvements for emergency communications for the hearing-impaired – that is Sorenson’s commitment to the deaf and hard of hearing community, to the rest of the VRS industry, and to the Commission.

1. How the Sorenson E911 Solution Works

Implementing Sorenson’s E911 solution involves both technical enhancements and interpreter training. The primary technical innovation is Sorenson’s ability to identify a 911 call immediately and route it to the front of the queue, so that emergency calls receive priority over all other calls and are answered immediately. Sorenson’s solution will enable it to identify and prioritize 911 calls so that they jump to the head of the queue and are connected immediately with an interpreter who has been trained regarding the proper handling of 911 calls.

The Sorenson E911 solution includes routing emergency calls to the appropriate public safety answering point (“PSAP”), so that first responders in the caller’s area are immediately put in touch with the caller. Sorenson is working with a third-party vendor (Intrado) to route emergency calls to the appropriate PSAP. Once the call is routed to the appropriate PSAP, the Sorenson VRS interpreter will relay the conversation between the deaf caller and the PSAP. Again, because of the way emergency calls are prioritized, there will never be a speed-of-answer issue based on Sorenson’s capacity: 911 calls will always be routed to an interpreter immediately, and from there, relayed to the correct PSAP.

An important step in the process of handling emergency calls involves determining the caller’s location. Without this crucial information, it is not possible to identify reliably the appropriate PSAP. Since VRS customers contact their VRS providers over a broadband Internet access connection, automatic location information is not passed to the VRS provider. As a result, an interpreter responding to a 911 call will need to determine the caller’s location manually. The interpreter will confirm the caller’s address (or ask the caller for his or her address) and then use a third-party database (Intrado) to determine the appropriate PSAP. Sorenson can extract the caller’s address from the Sorenson VRS equipment that is at the customer’s premises. This speeds the emergency response time as the Sorenson interpreter can, for example, flash the address on the screen and ask the customer to confirm it. Sorenson is the only VRS provider that has this capability today; other providers would need to ask 911 callers to provide their addresses manually.

Trained interpreters are key to a successful 911 system, and Sorenson has trained its interpreters to handle emergency calls in accordance with the procedures described above. Sorenson has established protocols for the handling of 911 calls. In addition, Sorenson has long had in place procedures to prevent problems such as the situation described by

Telecommunications for the Deaf (“TDI”), in which a female caller reportedly was denied access to a female interpreter.⁴³ Fully 90 percent of Sorenson’s interpreters are female, so it would be unlikely that a woman who wished to use a female interpreter would have had any difficulty doing so using Sorenson VRS. This is particularly true given Sorenson’s policy of honoring caller requests regarding the gender of the interpreter.⁴⁴ Because of this policy, a Sorenson subscriber would also have been able to avoid the problems NAD describes regarding a male VRS user who requested a male interpreter for a job interview call.⁴⁵ Such a request would have been honored by Sorenson. Similarly, the hearing daughter that NAD claims could not understand the interpreter she was assigned could have requested a different interpreter if she had been using Sorenson’s service, and a different interpreter would have been provided.⁴⁶

The Sorenson 911 solution will prevent many of the other problems described by NAD as well. Because Sorenson is developing a solution that will enable a 911 call from a Sorenson subscriber to reach an interpreter right away and be directly connected to the appropriate PSAP, the man who called about his wife’s condition before she died⁴⁷ would have immediate access to an interpreter and PSAP if he used Sorenson 911. Likewise, in the case of the elderly woman whose new medication made her feel dizzy, if she had been a Sorenson customer calling 911, she would have been placed directly in touch with the PSAP in her area.⁴⁸

⁴³ Letter from Claude L. Stout, Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.*, to Marlene Dortch, FCC Secretary, at 2 (Oct. 27, 2005) (“TDI *et al.* Oct. 27 *ex parte*”). Sorenson asked TDI whether the anecdote described in the October 27, 2005 *ex parte* filing involved a Sorenson interpreter, so that Sorenson could correct any problems. TDI has not provided Sorenson with the information needed to evaluate the situation and take corrective action, if any were needed. Sorenson’s interpreters always provide an identification number that consumers can use to file complaints regarding any service problems. Whenever Sorenson receives such a complaint, it follows up on the alleged problem and provides a response. In some cases, the problem is based on a misunderstanding on the part of the user. In other cases, the user has a legitimate complaint against the interpreter. In those cases, Sorenson takes the appropriate corrective action. For the complaint process to be effective, however, the user must provide Sorenson with the interpreter’s identification number and the date of the call. Otherwise, Sorenson cannot resolve the issue. It is very frustrating for Sorenson to hear allegations of misconduct – with the implication that the problem occurred using Sorenson’s service – and not be provided with the information it needs to investigate the issue properly and address any legitimate problems that may have occurred.

⁴⁴ See 47 C.F.R. § 64.604(a)(1)(vi) (requiring TRS providers to make “best efforts” to accommodate a user’s request regarding interpreter gender).

⁴⁵ Letter from Kelby Brick, National Association of the Deaf, *et al.* to FCC Chairman Kevin Martin, at 1-2 (Nov. 9, 2005) (filed Nov. 18, 2005) (“NAD *et al.* Nov. 9 *ex parte*”).

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 1.

⁴⁸ *Id.*

These anecdotes are critically important because they illustrate some of the serious implications of insufficient VRS emergency services. When deaf or hard-of-hearing callers are in danger, they must be able to call for help from first responders, as hearing callers do when they dial 911, even, as CSD points out, during times of heavy emergency call volume.⁴⁹ The Sorenson 911 solution, as described above, prioritizes emergency calls so that they are handled before other calls, thus ensuring that call volume does not cause a delay in the handling of emergency calls.

2. The Importance of Using Sorenson VRS for 911

As described above, Sorenson is implementing a call prioritization system that ensures that emergency calls are not delayed: they are moved to the head of the queue and are answered immediately by a trained interpreter. If the emergency call is placed with a VRS provider that does not prioritize calls, the call will go to the end of the queue and wait its turn among all the other calls for an interpreter. Even if the VRS provider complies with the FCC's speed-of-answer requirements, it could be three minutes or more before an interpreter responds to address the call. A customer who needs immediate medical attention may be grievously injured by the additional waiting time.

Even if an interpreter is immediately available, a VRS user cannot reach the appropriate PSAP unless the emergency responder knows the caller's location. Sorenson's ability to extract location information and present it to the caller for confirmation can save valuable time. Moreover, if the caller has selected a VRS provider that has not integrated its service with the third-party PSAP-lookup database, more time may be lost as the interpreter would probably have to try to determine the PSAP manually based on area code, which is a slow and far more error-prone process. And if the VRS provider had not implemented the emergency protocol or adequately trained its interpreters to follow that protocol, the call could be dropped, or sent to the wrong PSAP, or the waiting time could be extended even further.

V. SORENSON'S PRACTICES ARE CONSISTENT WITH THE PRACTICES OF PROVIDERS OF OTHER COMMUNICATIONS SERVICES

As noted above, section 225 is not a consumer protection statute. Nor is it designed to promote competition. It is worth noting, however, that even where the Commission has focused on competition or consumer protection it has declined to impose intrusive regulations of the type being proposed by Sorenson's competitors. In fact, Sorenson's business practices are consistent with the prevailing "total service" or platform approach used for most consumer communications today, including those provided by entities subject to FCC regulation.

Wireless: Wireless carriers regularly offer service plans that include a cellular phone, charging the customer a monthly charge for the service and a one-time (generally deeply discounted) fee for the phone. Whenever the customer uses that phone to communicate (whether for incoming or outgoing calls), it is the customer's wireless carrier that carries the traffic and is

⁴⁹ Letter from Karen Peltz Strauss, Consultant to Communications Services for the Deaf, Inc., to Marlene Dortch, FCC Secretary, Att. at 2 (Oct. 19, 2005) (filed Oct. 20, 2005) ("CSD Oct. 19 *ex parte*").

compensated for such carriage, either through regular monthly plan subscription charges or through charges imposed for the use of minutes above those included in the customer's plan. The customer cannot use the phone unless the carrier receives the traffic, and thus the compensation. A consumer choosing a cellular provider has several options, including Cingular, Sprint, T-Mobile, Verizon Wireless and others. After comparing these options, the consumer settles on a particular provider and signs up for that provider's service. Consumers understand that the cell phone is provided exclusively for use with the provider's service and do not expect to be able to use the phone obtained from one provider to use another provider's service.

Push-to-Talk: Even within the wireless voice industry, there is another, more analogous comparison: push-to-talk ("PTT"). PTT is a popular feature sometimes added on to regular wireless voice service. It cannot be used unless one purchases a PTT-capable phone from the carrier providing the service. As with standard wireless voice service, a user cannot use one carrier's PTT feature with any other carrier's phone and cannot use one carrier's PTT-capable phone to access a different carrier's PTT feature. Moreover, PTT can only be used to communicate with people using the *same carrier's* PTT feature. In other words, not only is the PTT-capable phone included with the carrier's service and usable only in connection with the carrier's service, but the PTT feature can only be used within the carrier's network of PTT users.⁵⁰

The Commission has explicitly endorsed the practice of wireless carriers providing phones as part of wireless voice service, recognizing the benefits it provides to consumers. In the *Cellular Equipment Order*, the Commission stated that it would not be in the public interest to prohibit carriers from offering service and equipment together because such bundling is efficient, reduces barriers to new customers and allows service to be provided more economically.⁵¹ The Commission further reasoned with accurate foresight that "with the influx of new subscribers due to the bundling of cellular [equipment] and service, the fixed costs of providing cellular service are spread over a larger population of users, achieving economies of scale and lowering the cost of providing service to each subscriber."⁵²

DBS: Another example is the DBS industry, where service providers routinely offer customers receivers bundled with a service subscription, and the equipment offered by one provider cannot be used to receive service from any other provider.⁵³ The FCC elected to allow DBS providers to include equipment with their services, recognizing that imposing regulation "would lead to distortions in the market, stifling innovation and undermining consumer

⁵⁰ Although it is aware of the nature of the PTT feature, the Commission has not acted to change it. See, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Ninth Report, 19 FCC Rcd 20597, ¶ 25 (2004). This is consistent with the FCC's decision in the instant messaging context. See discussion below.

⁵¹ *Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd 4028, ¶ 19 (1992) ("*Cellular Equipment Order*").

⁵² *Id.* ¶ 20.

⁵³ For example, a DirecTV receiver cannot be used to receive programming from Dish Network.

choice.”⁵⁴ The Commission also feared that regulation would “disrupt technical and investment structures that arose in a competitive environment.”⁵⁵

Wireline: The Commission also recognized the consumer benefits of permitting bundling of equipment and services in the wireline telecommunications industry, despite the fact that incumbent carriers that were dominant in the local exchange market would be bundling equipment with their local exchange services.⁵⁶ It was these benefits – lower prices, increased innovation, greater penetration – that led the FCC to conclude that the provision of services packaged with equipment was good for consumers.⁵⁷

Other Examples from Related Industries: Software provided by a service provider often works only with that provider’s service. For example, Google’s free desktop toolbar only places search requests with Google; it cannot be used to bypass Google and search on Yahoo. Likewise, Intuit’s Quicken software has a stock update feature that always pulls its information from Intuit’s chosen service provider; a user cannot use that feature to access other service providers. Similarly, AOL’s instant messaging (“IM”) software only works with AOL’s IM service. Moreover, as explained below, AOL’s IM service only enables communications between AOL IM users and it does not allow users to communicate with subscribers to other providers’ IM services.

Instant Messaging: The Coalition argues that the FCC’s order approving the AOL-Time Warner merger supports its effort to dismantle the Sorenson VRS platform and require Sorenson to donate the benefit of its technological innovation to competing VRS providers.⁵⁸ In reality, the facts presented in the *Merger Order* are far different from those presented here.⁵⁹ Moreover, the *Merger Order* was superseded by a later decision in which the FCC clearly stated the public interest benefits of allowing technological innovators to realize the rewards for their labors.

In the *Merger Order*, the Commission expressed its concern that through its merger with Time Warner, AOL would be able to combine its dominance in the narrowband text-messaging

⁵⁴ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, ¶ 90 (1998) (“*DBS Equipment Order*”).

⁵⁵ *Id.* ¶ 64.

⁵⁶ *Wireline Equipment Order* ¶ 12.

⁵⁷ *Id.* ¶¶ 16-17.

⁵⁸ Coalition Petition at 10-17 (citing *Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd 6547 (2001) (“*Merger Order*”)).

⁵⁹ The most obvious difference is that the *Merger Order* involved the combination of a text messaging service with complementary broadband services and facilities, whereas Sorenson is not seeking to combine its VRS with any other firm’s services or facilities. In addition, AOL started with 100 percent share in the relevant instant messaging market and offered a “closed” service that could not be used to send or receive messages from users of other IM services.

market, with Time Warner's high-speed transmission assets and content, to dominate high-speed messaging.⁶⁰ One of the conditions of the Commission's approval of the AOL-Time Warner merger was a prohibition against offering a high-speed advanced IM-based service unless AOL-Time Warner made its application interoperable with other instant messaging systems or the FCC granted a petition for relief based on a finding that imposing the condition no longer was in the public interest.⁶¹

The AOL-Time Warner merger example is not analogous to VRS. VRS is competitive, and although Sorenson is the market leader, it does not have market power.⁶² The VRS business is so new, and penetration is so low, that Sorenson serves less than 8 percent of all ASL users.⁶³ Moreover, even if the circumstances before the Commission here were similar to those presented in the *AOL-Time Warner Merger Order*, that Order's treatment of high-speed instant messaging was superseded by the *Relief Order*⁶⁴ in which the FCC lifted the condition imposed in the *Merger Order* on AOL-Time Warner's provision of advanced high-speed instant messaging-based services.⁶⁵

In the *Relief Order*, the FCC found that it was not in the public interest to require AOL to make its IM service interoperable with other IM services.⁶⁶ Rather, the Commission explicitly recognized that removing the condition imposed in the *Merger Order* would enable AOL-Time Warner "to offer new and innovative AIHS services and provide competitive choices to the marketplace at lower prices."⁶⁷ These principles apply equally to VRS today: imposing increased regulation as the Coalition and others suggest would reduce innovation and competition and the accompanying benefits they bring to consumers. The better course is for the

⁶⁰ *Merger Order*, ¶ 130.

⁶¹ *Id.* ¶ 325.

⁶² *See* note 20, *supra*.

⁶³ Accordingly, Sorenson is not a "dominant" VRS provider, as some claim. *See, e.g.*, Hamilton Dec. 23 *ex parte*, Att. at 4.

⁶⁴ *Relief Order*, *supra* note 34.

⁶⁵ Contrary to CSD's suggestion (Reply Comments of Communication Service for the Deaf at 13-15 (May 2, 2005) ("CSD Reply Comments")), the VRS industry – with no dominant firm and eight service providers competing in a nascent business ripe for additional innovation – resembles the AIHS market at the time of the 2003 *Relief Order* more closely than it resembles the AIHS market at the time of the 2000 *Merger Order*. Similarly, the Coalition is demonstrably incorrect when it asserts that it is "pure speculation to suggest" that leaving Sorenson VRS unregulated (as the FCC left AOL's AIHS unregulated in the *Relief Order*) will lead to new providers with "different innovative products." Reply Comments of California Coalition of Agencies Serving the Deaf and Hard of Hearing at 6 (May 2, 2005) ("Coalition Reply Comments"). In fact, as described above, Snap has already announced its intention to begin competing as a new VRS provider using a new videophone. *See Snap ex parte*.

⁶⁶ *Relief Order*, ¶¶ 11-12.

⁶⁷ *Id.* ¶¶ 12-13.

FCC to avoid unnecessary regulation and retain incentives for VRS providers to innovate and compete for customers.

Dial-Around: Some parties argue that just as local telephone service subscribers can “dial around” to different long distance providers each time they place a call, so too should VRS callers be able to use Sorenson’s VP-100 to “dial around” to any VRS provider in order to place a VRS call.⁶⁸ This analogy is inapt, however, and ignores the fact that Sorenson VRS is a single service provided by a single provider.

In the dial-around context, the dial tone is provided by the customer’s local voice service carrier. The caller picks up the telephone, hears the dial tone and uses local service to select a long distance carrier other than the long distance provider to which the caller is presubscribed. Thus, callers use their local service provider’s service to select a long distance carrier on a call-by-call basis. A wireline telephone user cannot use dial around to bypass the local service provider, however. Indeed, by its very nature, “dial around” involves two distinct services always accessed in the same order – first local, and then long distance – often provided by two distinct providers.

As the FCC has explained, for a deaf caller using VRS, reaching an interpreter is equivalent to a hearing caller receiving a dial tone.⁶⁹ There is only one service involved in the VRS call, and that is the service of the VRS provider the caller initially selected to provide “dial tone.”⁷⁰

Although they couch their arguments in familiar terms such as “interoperability” or “dial around,” Sorenson’s competitors are, in fact, seeking to create a radical new regulatory scheme unlike any the FCC has previously imposed on any other service provider. Specifically, these parties are suggesting that VRS users should be able to use a video phone provided as part of one provider’s service to select alternative providers of basic “dial tone” on a call-by-call basis. This

⁶⁸ See, e.g., Hamilton *et al.* Dec. 15 *ex parte* at 3; Reply to Comments of Hands On Video Relay Services, Inc. on Petition for Declaratory Ruling Concerning VRS Equipment Interoperability at 5 (May 2, 2005) (“Hands On Reply Comments”).

⁶⁹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, 20 FCC Rcd 1466, ¶ 8 (2005) (“January Declaratory Ruling”).

⁷⁰ To the extent that there is an appropriate analogy to “dial around” in the VRS context, it is the requirement that TRS users be afforded “access to their chosen interexchange carrier ... to the same extent that such access is provided to voice users.” 47 C.F.R. § 64.604(b)(3). This requirement has been temporarily waived for VRS providers due to the technical difficulties involved in implementation. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, ¶¶ 124-129 (2004) (“VRS Waiver Extension Order”). If these technical difficulties can be resolved, Sorenson will comply with any requirements governing access to interexchange carriers. In the meantime, Sorenson provides VRS callers with free long distance service, as required by the FCC’s waiver order. *Id.*

would be equivalent to requiring a customer's long distance carrier to provide access to a competing carrier's long distance service – a requirement that has never been imposed by the FCC. Unprecedented new requirements that have never been applied to hearing-to-hearing communications services would go far beyond the “functional equivalence” mandated by section 225.

VI. SORENSON'S PRACTICES ARE CONSISTENT WITH ALL APPLICABLE STATUTES AND REGULATIONS AS WELL AS FCC PRECEDENT AND COMMON PRACTICE IN THE COMMUNICATIONS INDUSTRY

A. Sorenson's Service is not Subject to the Common Carrier Requirements of Title II of the Act

The Coalition and other parties argue that Sorenson's service is subject to a litany of provisions contained in Title II of the Act, including section 201(a),⁷¹ section 201(b),⁷² section 202(a),⁷³ sections 206-208,⁷⁴ section 226,⁷⁵ section 251(a)(1),⁷⁶ section 251(a)(2),⁷⁷ section 251(b)(3),⁷⁸ section 255,⁷⁹ and section 256.⁸⁰ These arguments, however, generally ignore or

⁷¹ National Association of the Deaf Comments on Relay Service Interoperability at 10 (Apr. 15, 2005) (“NAD Comments”); Telecommunications for the Deaf, Inc. and Deaf and Hard of Hearing Consumer Advocacy Network Comments in Support of Coalition Petition for Declaratory Ruling on Video Relay Service Interoperability, CC Docket No. 98-67, at 5 (Apr. 15, 2005) (“TDI/DHHCAN Comments”).

⁷² Coalition Petition at 27-28; TDI/DHHCAN Comments at 5; CSD Comments at 2; Hands On Comments at 3-7; Hands On Nov. 11 *ex parte* at 3, 6.

⁷³ Coalition Petition at 28-29; TDI/DHHCAN Comments at 5; CSD Comments at 2.

⁷⁴ Hands On Reply Comments at 4 n.3 (claiming that Section 5 of Sorenson's User Agreement, which requires arbitration of disputes, “appears to violate consumers' rights under Section 206, 207 and 208 of the Act to resort to the FCC's complaint process.”).

⁷⁵ See Hands On Reply Comments at 5; Hands On Nov. 11 *ex parte* at 1.

⁷⁶ Coalition Petition at 24-25; TDI/DHHCAN Comments at 4; CSD Comments at 2; Reply Comments of Eric Gjerdingen – Corrected Version, CC Docket No. 98-67, at 9-10 (May 4, 2005) (“Gjerdingen Reply Comments”).

⁷⁷ Coalition Petition at 25; NAD Comments at 13; CSD Comments at 2; Gjerdingen Reply Comments at 10.

⁷⁸ Coalition Petition at 25; TDI/DHHCAN Comments at 5; CSD Comments at 2.

⁷⁹ Coalition Petition at 25; NAD Comments at 12; TDI/DHHCAN Comments at 6; CSD Comments at 2; CSD Reply Comments at 20-21; Comments of Eric Gjerdingen, CC Docket No. 98-67, at 8 (“Gjerdingen Comments”); Gjerdingen Reply Comments at 11.

⁸⁰ Coalition Petition at 26-27; TDI/DHHCAN Comments at 7; CSD Comments at 2; Comments of Hamilton Relay, Inc. at 2-3 & n.2 (Apr. 15, 2005) (“Hamilton Comments”); Gjerdingen Reply Comments at 11; Letter from Karen Peltz Strauss, Consultant to

gloss over the fact that the Title II obligations that parties seek to foist on Sorenson expressly apply only to “telecommunications carriers” (or “common carriers”), and/or the “telecommunications services” provided by such carriers, or are otherwise inapplicable to Sorenson.⁸¹ In particular, sections 201 and 202, as well as the complaint provisions of section 206-208, apply only to “common carrier[s].”⁸² Section 226 applies to “providers of operator services,” and defines “operator services” to mean “any interstate telecommunications service” that meets certain requirements.⁸³ Subsections (a)(1) and (a)(2) of section 251 apply only to “telecommunications carrier[s],” and subsection (b)(3) applies only to a particular type of telecommunications carrier, namely “local exchange carrier[s].”⁸⁴ Likewise, section 255 applies to “provider[s] of telecommunications service,”⁸⁵ while section 256 merely authorizes the Commission to take certain steps to coordinate network interconnectivity and participate in the development of network interconnectivity standards.⁸⁶

Communication Service for the Deaf, Att. at 2 (June 17, 2005) (“CSD June 17 *ex parte*”); Hands On Nov. 11 *ex parte* at 1.

⁸¹ See 47 U.S.C. § 153(44) (defining “telecommunications carrier”); 47 U.S.C. § 153(46) (defining “telecommunications service”); 47 U.S.C. § 153(10) (defining “common carrier” or “carrier”).

⁸² 47 U.S.C. § 201(a) & (b); 47 U.S.C. § 202(a); 47 U.S.C. §§ 206, 207, 208(a).

⁸³ 47 U.S.C. § 226(a)(7), (b)(1), & (b)(2). Section 226 also imposes certain requirements on “aggregators” of operator services. 47 U.S.C. § 226(c). Sorenson is neither a provider nor an “aggregator” of operator services.

⁸⁴ 47 U.S.C. § 251(a) & (b). Section 251(a)(2) requires “telecommunications carriers” to “comply with the guidelines and standards established pursuant to section 255 or 256.”

⁸⁵ 47 U.S.C. § 255(c). Section 255(b) also applies to “manufacturer[s] of telecommunications equipment or customer premises equipment.” As an initial matter, it is not clear that the VP-100 is “telecommunications equipment” or “customer premises equipment,” as those terms are defined in section 3 of the Act. See 47 U.S.C. § 153(45); 47 U.S.C. § 153(14); see also 47 U.S.C. § 153(43) (defining “telecommunications” as the “transmission . . . of information . . . without change in the form or content of the information as sent and received”). Moreover, even if the VP-100 were subject to section 255(b), it clearly is “designed, developed, and fabricated to be accessible to and usable by individuals with disabilities,” as mandated by that provision. Finally, no party has identified a specific FCC requirement adopted pursuant to section 255 that Sorenson allegedly has violated, and Sorenson is aware of no such requirement.

⁸⁶ 47 U.S.C. § 256(b)(1) & (b)(2) (FCC “may participate” in the development by appropriate industry standards organizations of “public *telecommunications network*” interconnectivity standards) (emphasis added). Pursuant to section 256, the Network Reliability & Interoperability Council (“NRIC”) has adopted hundreds of guidelines that apply to various types of communication entities. No party in this proceeding has identified with specificity any NRIC guideline applicable to Sorenson that they believe Sorenson has violated, and Sorenson is aware of no such guideline. In any event, Sorenson’s compliance with any such guideline would be voluntary rather than mandatory.

By their very terms, these provisions explicitly do not apply to Sorenson. Sorenson is not a telecommunications carrier, nor does it offer any telecommunications services. Instead, the service provided by Sorenson is an “information service” – namely, VRS, which is a type of TRS.⁸⁷ The Commission has expressly found that “TRS providers do not provide telecommunications services” and “are not telecommunications carriers.”⁸⁸ Accordingly, Sorenson is not subject to those Title II obligations that apply only to telecommunications carriers.⁸⁹

⁸⁷ 47 U.S.C. § 153(20) (defining “information service”).

⁸⁸ 2000 *Improved TRS R&O*, ¶ 81. CSD claims that the FCC subsequently issued an “inconsistent” declaratory ruling that “left . . . open” the question of whether TRS providers provide a telecommunications service. CSD Comments at 3 n.2 (citing *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779, ¶¶ 13-14 (2002)). In that decision, the FCC found that IP Relay squarely falls within the statutory definition of TRS in section 225, and that it was unnecessary to reach the question of “whether IP Relay constitutes telecommunications, telecommunications service, or information service.” *Id.* ¶ 14. The FCC’s prudent restraint in refusing to answer a legal issue not directly before it is not “inconsistent” with, and does not “re-open,” the FCC’s settled finding that TRS providers do not provide telecommunications services. VRS is a broadband application that rides on Internet access, which is itself an information service. *See, e.g., National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2698, 2704 (2005) (“*NCTA v. Brand X*”). In addition, VRS provided via an interpreter clearly falls under the FCC’s well-established definition of an “information service.” For example, it involves a “net protocol conversion” (*i.e.*, the translation of speech into ASL and *vice versa*.) *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶¶ 104, 106 (1996), (explaining that “both protocol conversion and protocol processing services are information services under the 1996 Act.”)

⁸⁹ As the Commission and courts have repeatedly found, information service providers are not subject to those requirements of Title II that apply only to common carriers or telecommunications carriers. *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005) (“The Communications Act regulates telecommunications carriers, as common carriers, under Title II. Information service providers, ‘by contrast, are not subject to mandatory common-carrier regulation under Title II.’”) (quoting *NCTA v. Brand X*, 125 S.Ct. 2688, slip op. at 3); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 108 (2005) (“Title II obligations have never generally applied to information services, including Internet access services.”); *id.* ¶ 121 (“Like the other Title II obligations discussed above, section 255 expressly applies to telecommunications services, not information services.”); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Notice of Proposed Rulemaking, 11 FCC Rcd 18877, ¶ 71 (1996) (“information services affiliates and manufacturing affiliates [of a BOC], because they are not ‘common carriers’ under the Communications Act, are not subject to sections 201 and 202”). As these

Some of the parties eager to subject Sorenson to common carrier obligations theorize that the ADA's principle of "functional equivalence," as codified in section 225 of the Act,⁹⁰ requires the Commission to conclude that "TRS providers, including VRS providers, have all of the obligations of telecommunications carriers, [regardless of] whether VRS is [properly classified as] a telecommunications service or an information service."⁹¹ This theory is grounded on a fallacy, however: it erroneously assumes that section 225 requires not only *functional equivalency*, but also *identical regulation*, of VRS and traditional voice telephony. In fact, there is no provision in either section 225 or the ADA that imposes such a requirement. Instead, the plain language of section 225 requires the FCC to examine whether the *functions* of (but not the regulations attaching to) a telecommunications relay service are *equivalent* (but not identical) to the functions of a traditional voice telecommunications service.

Drawing on the plain language of section 225, the FCC has concluded that the "functional equivalency test" of that section requires the Commission to determine whether there are any "material functional differences" between two services that would be "of practical significance to customers."⁹² Contrary to what some parties appear to believe, "functional

precedents make clear, there is no merit to Hands On's argument that VRS providers are "common carriers" that are subject to section 201 of the Act. Hands On Comments at 4-6.

⁹⁰ 47 U.S.C. § 225(a)(3) (defining TRS to mean "telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual *in a manner that is functionally equivalent* to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio.") (emphasis added).

⁹¹ Telecommunications for the Deaf, Inc. and Deaf and Hard of Hearing Consumer Advocacy Network Reply Comments Regarding Coalition Petition for Declaratory Ruling at 6 (May 2, 2005) ("TDI/DHHCAN Reply Comments"). See also CSD Comments at 3 (in promoting functional equivalency, "the FCC need not reach the question of whether TRS or VRS is a telecommunications service in order to hold all VRS providers accountable under these [Title II] provisions"); TDI/DHHCAN Comments at 4-5 (functional equivalency requires VRS operators to comply with various Title II mandates).

⁹² *Cellexis International, Inc. v. Bell Atlantic NYNEX Mobile Systems, Inc., et al.*, Memorandum Opinion and Order, 16 FCC Rcd 22887, ¶ 11 (2001) (in determining functional equivalency, FCC must examine "customer perception to help determine whether the services being compared provide the same or equivalent functions. . . . The test presumes that not all differences between the services make them *a priori* unlike. Rather, the differences must be functionally material or, put another way, of practical significance to customers.") (citing *Beehive Telephone, Inc. v. Bell Operating Companies*, Memorandum Opinion and Order, 10 FCC Rcd 10562, ¶ 28 (1995)). The D.C. Circuit has repeatedly endorsed the same functional equivalency test in the context of section 202(a), emphasizing the centrality of the customer's perspective. See *American Broadcasting Corp. v. FCC*, 663 F.2d 133, 139 (D.C. Cir. 1980) ("The [functional equivalence] test looks to the nature of the services offered . . . ; the perspective of the customer faced with differing services is often considered a significant

equivalence” is not a competitive safeguard designed to protect rival firms’ ability to serve particular customers.⁹³ Rather, the test focuses on end-user customers’ real-world perceptions as to whether VRS and voice services provide functions that are materially equivalent. The test thus does not require the FCC to apply to TRS the same regulations that apply to voice service.⁹⁴ Parties’ attempts to use functional equivalency as a bootstrap for imposing Title II obligations are therefore misplaced.

In contrast to many of the provisions of the 1996 Act, section 225 is not a competition provision. Nor is it a consumer protection statute. Rather, section 225 was adopted as part of the

factor.”); *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 796 (D.C. Cir. 1982) (describing “customer perception as a linchpin” of functional equivalency).

⁹³ Because “functional equivalence” is not a competition regulation, CSD and others are misguided in their attempts to use “functional equivalency” to import unbundling requirements and other provisions designed to promote competition with the incumbent LECs to the VRS context. The ADA’s functional equivalency provisions do not give competitors any rights against Sorenson. They only ensure that hearing-impaired end users of VRS receive service that is as comparable as possible to the service provided to hearing users of telecommunications services.

⁹⁴ Only in the rare circumstance where a particular regulation gives rise to a function of a particular service that is of material and practical significance to the consumer *might* “functional equivalency” suggest that the FCC could apply that same regulation to VRS. For example, in 1991, the Commission determined that functional equivalency required it to impose equal access obligations on TRS providers. Thus, the ability of consumers to access the presubscribed long distance carrier of their choice must be, as a practical matter, perceived by consumers to be an integral function of local telephony service. The resulting equal access rule for TRS providers, now codified at 47 C.F.R. § 64.604(b)(3), was subsequently waived by the FCC with respect to VRS providers. See *VRS Waiver Extension Order*, ¶ 127. Contrary to the claim of at least one party, therefore, Sorenson is not in violation of this rule today. Gjerdingin Reply Comments at 11. Other parties have used the term “equal access” to refer to matters outside the scope of “equal access” as that term has been used by the FCC. See Coalition Petition at 28; NAD Comments at 8; TDI *et al.* Oct. 27 *ex parte* at 2; CSD Oct. 19 *ex parte*, Att. at 1-2. As noted, the FCC’s equal access rules ensure the ability of consumers to reach the *long distance carriers* of their choice. The equal access rules do not involve the ability of a Sorenson customer to reach a *VRS provider* other than Sorenson, any more than they would involve the ability of a Cingular customer to use a Cingular handset to place a call via Verizon Wireless. Nor do the problems that some VRS end users may experience as a result of using multiple video devices that can receive incoming calls and their use of multiple VRS providers fall under equal access. Any problems arising from the use of multiple pieces of equipment or lines are unrelated to the specific requirements of equal access. See, e.g., *United States v. GTE Corp.*, 603 F. Supp. 730, 743 n.55 (D.D.C. 1984) (listing ten features of “full equal access”). In any event, these problems are not unique to Sorenson, as some suggest, but rather are endemic to the VRS industry as a whole. See Hands On Reply Comments at 5; NAD Reply Comments at 7-8; Hamilton *et al.* Dec. 15 *ex parte* at 2. Finally, arguments regarding “equal access codes” are addressed above in the discussion of dial-around. See Hands On Reply Comments at 5.

ADA as a way of ensuring that deaf and hard-of-hearing people have access to communications services in a way that is “functionally equivalent” to the services that hearing people use. The Commission should reject efforts by Sorenson’s competitors to turn section 225 into a competition provision, particularly when they urge the Commission to adopt regulations that may benefit individual users. Instead, the Commission should be mindful of the dubiousness of the argument that intrusive regulation of customer equipment, particularly in the name of competition, is authorized, much less required by, section 225. The FCC should also consider that adopting the language proposed by Hands On would require IP Relay and CapTel providers to unbundle their platforms as well.⁹⁵

Several parties also claim that Title II obligations must apply to Sorenson because section 225 imposes common carrier obligations on TRS providers.⁹⁶ It is true that section 225(d)(1)(E) directs the FCC to prescribe regulations that “prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services.”⁹⁷ The wording of this provision, however, makes clear that Congress intended common carrier obligations to apply to TRS only to the extent needed to address two specific problems – refusal of calls and limiting the length of calls.⁹⁸ Section 225 should not be read to suggest that the entire Title II regime must be imported into the TRS regulations. To the contrary, under the canon of *expressio unius*, the fact that TRS providers must fulfill the obligations of common carriers in two carefully circumscribed scenarios expressly described in the Act proves that Congress did not intend for TRS providers to be treated as common carriers in general.⁹⁹ Moreover, Sorenson clearly complies with section 225(d)(1)(E) and its implementing regulations. Sorenson does not refuse or limit the length of

⁹⁵ Hands On Dec. 19 email; Hamilton *et al.* Dec. 15 *ex parte* at 1.

⁹⁶ See Coalition Petition at 6, 27; NAD Comments at 10; NAD Reply Comments at 6; TDI/DHHCAN Comments at 5; TDI/DHHCAN Reply Comments at 6; CSD Comments at 6-8; Gjerdingen Comments at 8; Gjerdingen Reply Comments at 9, 10; Hands On Comments at 5.

⁹⁷ 47 U.S.C. § 225(d)(1)(E).

⁹⁸ The relevant implementing regulations are: (1) 47 C.F.R. § 64.604(a)(3)(i), which states that “Consistent with the obligations of telecommunications carrier operators, CAs are prohibited from refusing single or sequential calls or limiting the length of calls utilizing relay services”; and (2) 47 C.F.R. § 64.604(a)(3)(ii), which states that “relay services shall be capable of handling any type of call normally provided by telecommunications carriers unless the Commission determines that it is not technologically feasible to do so.”

⁹⁹ Under that canon, the fact that Congress expressly applied common carrier obligations to TRS providers in particular circumstances is to be interpreted as Congress’s intent that common carrier obligations should not be applied to TRS providers in all other circumstances. See, e.g., William N. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation* at 641 (West Pub. 1988) (“the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced”). Stated differently, if Congress had intended all common carrier obligations to apply to TRS carriers, there would have been no need for Congress to specify in section 225(d)(1)(E) that those obligations apply in the specific circumstances of refusal of calls and limiting the length of calls.

calls placed via its service, and its service is capable of handling every type of call normally provided by telecommunications carriers.¹⁰⁰ No other common carrier obligations do or should apply to Sorenson.¹⁰¹

Finally, several parties point to the March 2005 *Madison River Order*, issued by the Enforcement Bureau under delegated authority, as evidence that Sorenson is bound by section 201(b).¹⁰² In that order, the Enforcement Bureau adopted a consent decree, entered into between itself and Madison River Communications, LLC and its affiliates (“Madison River”), terminating an investigation into the compliance of Madison River with section 201(b). The *Consent Decree* expressly states that it does not constitute a legal finding regarding Madison River’s compliance or non-compliance with the Act or the FCC’s orders and rules;¹⁰³ the *Consent Decree* therefore cannot properly be cited as a precedent regarding what constitutes a violation of section 201(b).¹⁰⁴ Moreover, even if the *Madison River Order* had been a Commission order entitled to full precedential value, a finding that Madison River is subject to section 201(b) would have no bearing on Sorenson. Madison River’s business includes the provision of both local exchange

¹⁰⁰ Sorenson complies with the latter requirement to the extent it has not been waived. See *VRS Waiver Extension Order* ¶¶ 113-115 (waiving, *inter alia*, the handling-all-calls requirement with respect to the offering of operator-assisted calls and the billing of certain types of long distance calls to the end user).

¹⁰¹ Parties’ confusion about the requirements of section 225 may arise from the fact that section 225 imposes TRS requirements on all common carriers, but TRS itself is not a common carrier service. See *2000 Improved TRS R&O*, ¶ 81 (“Because TRS providers do not provide telecommunications services, they are not telecommunications carriers”). Sorenson is not a common carrier or a telecommunications carrier. Instead, Sorenson is a non-common carrier – specifically, an information service provider – that qualifies for compensation from the Interstate TRS Fund because it is part of a certified state program. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order on Reconsideration, CG Docket No. 03-123, FCC 05-203, ¶ 19 n.75 (rel. Dec. 12, 2005). As the FCC recently stated, “non-common carriers seeking to offer VRS or IP Relay may . . . do so by joining a certified state program.” *Id.* ¶ 22 n.84 (emphasis in original).

¹⁰² *Madison River Communications, LLC and affiliated companies*, Order, 20 FCC Rcd 4295 (2005) (“*Madison River Order*”) and attached Consent Decree (“*Consent Decree*”). See Hands On Comments at 8-9; Hands On Reply Comments at 10; NAD Comments at 11-12; Hamilton *et al.* Dec. 15 *ex parte* at 3; NAD *et al.* Nov. 9 *ex parte* at 4; CSD Comments at 10; Hands On Nov. 11 *ex parte* at 2; TDI *et al.* Oct. 27 *ex parte* at 2; CSD June 17 *ex parte*, Att. at 4.

¹⁰³ *Consent Decree* ¶ 10.

¹⁰⁴ If the *Consent Decree* in fact had the groundbreaking legal effect claimed by these parties (*i.e.*, extending application of section 201(b) to information service providers), it would not have been adopted under delegated authority. Under the Commission’s rules, “[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines” must be referred to the Commission *en banc*, and cannot be handled pursuant to authority delegated to the Enforcement Bureau. 47 C.F.R. § 0.311(a)(3).

service and Internet access.¹⁰⁵ Based on the explanation set forth in the *Madison River Order* and *Consent Decree*, the Enforcement Bureau initiated its investigation based on allegations that Madison River was unjustly and unreasonably blocking ports used for VoIP applications in violation of section 201(b). The *Consent Decree* does not distinguish between Madison River's ISP operations and its LEC (common carrier) operations. However, because section 201(b) applies only to common carriers, as a matter of logic and law that section could apply to Madison River only to the extent it was acting as a LEC.¹⁰⁶ Sorenson is not a LEC or any other type of common carrier and it is not affiliated with any common carrier. The *Madison River Order* and *Consent Decree* therefore does not apply to Sorenson or the VRS it provides.

Although competitors are eager to point to the *Madison River Order* – a Bureau-level consent decree that has no relevance to non-common carriers such as Sorenson – they ignore the much more relevant precedent established by the U.S. Supreme Court in its recent *NCTA v. Brand X* decision. In *NCTA v. Brand X*, the Supreme Court ruled that providers were free to offer underlying telecommunications as part of an Internet access service and that such a service would be considered an information service for purposes of FCC regulation. Thus, the Court recognized that regulators should consider a service as a whole rather than require providers to break apart their services and offer different piece-parts to competitors. The Commission should follow this precedent by declining to impose intrusive regulation on the VP-100 that has the effect of dismantling Sorenson's VRS.¹⁰⁷

As the foregoing discussion shows, there is no sound legal basis for imposing on Sorenson or any other VRS provider the various Title II regulations identified by the Coalition and other parties. Moreover, as explained in Section III, above, the "interoperability" requirements proposed by some parties are unprecedented and have never been imposed even on common carriers subject to the full breadth of Title II's regulatory regime.

B. Sorenson Complies Fully with Section 225 of the Act

Parties argue that Sorenson violates the "functional equivalency" mandate of section 225 of the Act by: (1) "blocking" certain incoming calls;¹⁰⁸ (2) requiring the use of a dynamic IP address for calls between a Sorenson customer and a non-Sorenson customer, while using

¹⁰⁵ See "Welcome to Madison River Communications," available at: <http://www.madisonriver.net/index_madisonriver.php>.

¹⁰⁶ This is consistent with the fact that the main beneficiary of any port blocking would be Madison River's LEC operations, which stood to lose customers to competing VoIP providers.

¹⁰⁷ See *NCTA v. Brand X*, 125 S. Ct. 2688, 2704 (2005) (defining an offering as "what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product.")

¹⁰⁸ NAD Comments at 9; CSD Comments at 6-7; Hamilton Comments at 3; Comments of Rehabilitation Engineering Research Center on Telecommunications Access (RERC-TA) at 3-4 (Apr. 15, 2005); Gjerdingen Comments at 8-9.

“phone numbers” for Sorenson-to-Sorenson calls;¹⁰⁹ and (3) prohibiting customers from using the VP-100 to place calls to a VRS provider other than Sorenson.¹¹⁰ These claims are bereft of factual or legal merit.

First, Sorenson does not block incoming calls. As explained above, Sorenson’s customers are free to receive calls from (and make calls to) any other person, regardless of whether that person is a Sorenson subscriber.¹¹¹ Second, the fact that incoming and outgoing calls between Sorenson and non-Sorenson customers may require the calling party to dial a dynamic IP address is not unique to Sorenson.¹¹² As described above, the IP address is the industry standard. Although Sorenson has developed a mechanism (which is integrated into the VP-100) that permits the dialing of “phone numbers” for calls between its subscribers,¹¹³ for technological reasons that innovation cannot be extended to calls between Sorenson and non-Sorenson users.¹¹⁴ Sorenson’s innovation has greatly enhanced the convenience of thousands of consumers. It would be unwise to punish Sorenson’s customers by adopting a rule that effectively would deprive Sorenson’s customers of a convenient solution.¹¹⁵

¹⁰⁹ TDI/DHHCAN Reply Comments at 4; CSD June 17 *ex parte*, Att. at 4-5; Gjerdingen Reply Comments at 8. To the extent that CSD seeks a “seamless numbering scheme” for all VRS users, CSD June 17 *ex parte*, Att. at 5, it should focus its efforts on an industry proposal. See “FCC Announces the Next Meeting of the North American Numbering Council,” Public Notice, CC Docket No. 92-237, DA 05-3172, at 2 (rel. Dec. 21, 2005).

¹¹⁰ Coalition Petition at iii, 8-10; TDI/DHHCAN Comments at 3-4; Hamilton Comments at 3; Comments of Alexander Graham Bell Association for the Deaf and Hard of Hearing, CC Docket No. 98-67, at 1 (Apr. 15, 2005) (“Alexander Graham Bell Comments”); Gjerdingen Reply Comments at 7; CSD Oct. 19 *ex parte*, Att. at 1.

¹¹¹ When the Coalition Petition was filed, Sorenson did contractually restrict the ability of its customers to receive incoming calls from another VRS provider. Sorenson has since removed this contractual provision, and does not restrict any incoming calls.

¹¹² The need to obtain the IP address of the deaf person for incoming calls is the same regardless of the VRS provider used by the caller. Usually, the deaf person emails or instant messages the IP address to the hearing person (or the VRS provider) to enable the call to take place.

¹¹³ See note 16, *supra*.

¹¹⁴ This feature of Sorenson’s service is similar to the abbreviated dialing features enabled by PBXs. By their nature, these types of conveniences are available only to customers on the same “network.”

¹¹⁵ Contrary to the claim of CSD, Sorenson’s use of pseudo “phone numbers” as aliases for IP addresses for purposes of incoming calls to Sorenson users does not “restrict[] access numbers” and thereby violate the goal of the FCC’s 711 orders to implement “easy dialing arrangements.” CSD Comments at 23, 24. Sorenson’s innovation has made it easier for numerous consumers to use TRS, and has not increased the difficulty of a single consumer.

Third, as explained above, Sorenson's practice of requiring that customers use the VP-100 only as part of their Sorenson service is identical to the practices of other providers regulated by the FCC, such as CMRS providers. These practices therefore are consistent with the "functional equivalence" requirements of the Act. In their zeal to have Sorenson provide them with access to the VP-100, however, parties overlook the obvious similarities between Sorenson's service and other services, and resort to strained analogies. For example, as explained above, the FCC's orders regarding AOL's IM service do not support the Coalition's efforts to dismantle Sorenson's service.¹¹⁶ Likewise, there is no sound basis for viewing the roaming obligation of CMRS carriers as analogous to requiring Sorenson to allow its subscribers to use the VP-100 to place calls via providers other than Sorenson.¹¹⁷ The purpose of the roaming requirement is to allow customers that cannot reach the CMRS provider to which they have subscribed – usually because they are outside of that provider's home service area – to nonetheless place, receive, or continue a call using the facilities of another CMRS provider.¹¹⁸ This analogy has no relevance in the VRS world.¹¹⁹

Even more strained than such analogies is the claim that Sorenson somehow does not obtain its customers' voluntary and informed consent to the contractual obligation to use the VP-100 only as part of Sorenson's service.¹²⁰ In its Public Notice of January 26, 2005, the Commission prohibited VRS providers from adjusting the hardware or software on an individual's VRS equipment "to restrict access to other VRS providers without the consumer's informed consent."¹²¹ In compliance with that requirement, Sorenson takes a number of steps to obtain the informed consent of its consumers, including:

- Providing the following information to consumers who apply for a VP-100 through Sorenson's web site:

¹¹⁶ See *supra* at 22-23 (discussing the *AOL-Time Warner Merger Order* and subsequent *Relief Order*).

¹¹⁷ See Coalition Petition at 28; CSD Comments at 5; TDI/DHHCAN Comments at 4.

¹¹⁸ See, e.g., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 15047, ¶ 2 (2005); see also 47 C.F.R. § 20.12(c).

¹¹⁹ There also is no merit to the attempt to draw an analogy between Sorenson's service and operator services. See Hands On Reply Comments at 5. As noted above, operator services are telecommunications services, and do not include information services such as VRS. Moreover, access to VRS is analogous to basic dial-tone service, not to operator services, as that term is defined in section 226 of the Act.

¹²⁰ See, e.g., Coalition Petition at 2, 7, 10; NAD Comments at 14-15; Gjerdingen Comments at 2; Gjerdingen Reply Comments at 11-15.

¹²¹ "Federal Communications Commission Clarifies that Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices Are Improper and Reminds that Video Relay Service (VRS) May Not be Used as a Video Remote Interpreting Service," Public Notice, 20 FCC Rcd 1471 (2005) ("January 2005 Public Notice").

Thank you for your interest in the Sorenson VP-100 videophone. You can use the Sorenson VP-100 to make point-to-point call to other individuals. However, Sorenson VRS does not permit you to use Sorenson-licensed videophones to call other VRS providers. You are free to use other equipment you may have to contact other VRS providers. By submitting this application you are indicating that you would like to obtain a Sorenson VP-100 videophone for use with Sorenson VRS.¹²²

- Offering any would-be subscriber an opportunity to review the VP-100 Sorenson VRSTTM Service & Products Agreement (“License Agreement”) prior to applying for a free VP-100. On the first page of the License Agreement, under General Terms and Conditions, the initial sentence reads, “You may not use the Sorenson supplied products and services to initiate interpreting services from a Video Relay Service provider other than Sorenson Media.”¹²³
- Ensuring that its customer service representatives and installer/trainers who interact with deaf and hard-of-hearing persons are fluent in ASL, and instructing such personnel to answer any customer questions, including those regarding the use of the VP-100 with non-Sorenson VRS.

Through these multiple steps, Sorenson clearly informs prospective customers of the limitations on the use of the VP-100 and obtains their informed consent in a manner that complies with the FCC’s January 2005 Public Notice. Sorenson in no way coerces such consent. Nevertheless, the Coalition and others claim that this consent is not valid because (1) Sorenson’s customers cannot be expected to understand that they are contractually bound to use the VP-100 only with Sorenson’s VRS;¹²⁴ and (2) Sorenson’s distribution of the VP-100 at no cost to the consumer, coupled with a requirement that the VP-100 must be used with Sorenson’s service, is an impermissible financial incentive.¹²⁵

The first argument has no legal basis. Sorenson fully complies both with the January 2005 Public Notice and the functional equivalence mandate of section 225.

The second argument is based on a misreading of the FCC’s “no incentives” decisions adopted earlier this year. In those decisions, the Consumer and Governmental Affairs Bureau found that “any program that involves the use of any type of financial incentives to encourage or reward a consumer for placing a TRS call . . . is inconsistent with Section 225” of the Act and

¹²² “Apply for a Sorenson VP-100 Videophone,” *available at*: <<http://www.sorensonvrs.com/apply/index.php>>.

¹²³ License Agreement, *available at*: <http://www.sorensonvrs.com/media/VP100_agreement.pdf>.

¹²⁴ *See, e.g.*, Coalition Petition at 7, 10; TDI/DHHCAN Comments at 8.

¹²⁵ *See* CSD Reply Comments at 3; NAD Comments at 15; Coalition Petition at 12; Gjerdingen Reply Comments at 18; CSD Oct. 19 *ex parte*, Att. at 2; CSD June 17 *ex parte*, Att. at 4.

the TRS regulations.¹²⁶ In making this finding, the FCC emphasized that it was prohibiting any TRS reward or incentive program – such as usage-based reward or incentive programs, programs that tie the receipt of equipment to minimum usage requirements, or the offering of free or discount long distance services to TRS consumers – that “has the effect of enticing TRS consumers to make TRS calls that they would not otherwise make, which allows the provider to receive additional payments from the [Interstate TRS] Fund, and results in ‘payments’ to consumers for using the service.”¹²⁷ By distributing free VP-100 videophones to its customers, Sorenson simply enables those customers to use a videophone that is specifically designed for, and integrated into, Sorenson’s total service.¹²⁸ Customers who receive the VP-100 are under no obligation to use it. Greater use of the VP-100 does not result in any financial “reward” or “payment” to Sorenson’s customers, nor does providing customers VP-100s have the effect of enticing those customers to make TRS calls they would not otherwise make.¹²⁹ In short, Sorenson provides no financial incentives or rewards that invalidate the informed consent that Sorenson obtains from its customers or that violate the functional equivalency mandate of section 225.¹³⁰

Sorenson also fully complies with all of the non-waived mandatory minimum standards that the Commission has adopted pursuant to section 225.¹³¹

¹²⁶ *January Declaratory Ruling*, ¶ 1; see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 20 FCC Rcd 12503 (2005).

¹²⁷ *January Declaratory Ruling* ¶ 8.

¹²⁸ Sorenson is not alone in providing equipment to VRS users free of charge. See, e.g., Hands On VRS “Equipment Application,” available at: <<https://secure.hovrs.com/equipment/requestform.aspx>>; “Hamilton Relay VRS Equipment Request Form,” available at: <<http://207.188.238.148/DLink/>>. CSD has previously distributed such equipment, but now indicates that the program is under review and “currently closed.” See notice, available at: <<https://ssl.c-s-d.org/vrsdb/freeform.asp>>. Nor is Sorenson the only provider that requires a customer to use such equipment only with the provider’s service.

¹²⁹ For example, a Sorenson end user who places twenty calls per day via the VP-100 is in the identical financial situation as a Sorenson end user who places only one call – or even no calls – per day via the VP-100. A Sorenson customer is free, moreover, to use the VRS of other providers at any time, and receives no financial incentive or reward to use Sorenson’s VRS instead of that of its competitors.

¹³⁰ Indeed, as noted above, Sorenson has made greater strides than any other VRS provider in making its service functionally equivalent to traditional voice service. The unprecedented degree to which Sorenson has achieved functional equivalency is reflected in the high marks Sorenson receives in customer satisfaction surveys, as well as the high and growing traffic volumes carried over Sorenson’s service.

¹³¹ 47 U.S.C. § 225(c); 47 C.F.R. § 64.604. One party claims that Sorenson’s customers do not have access to a rapid and efficient nationwide communication system, as required by section 225(b)(1), because “they cannot access the other VRS providers.” Gjerdingen Reply Comments at 9-10. Section 225(b)(1) merely imposes an obligation on the Commission, and not Sorenson.

C. Sorenson Uses NECA Funds for Proper Purposes

Several parties suggest that Sorenson is unlawfully receiving reimbursement from the Interstate TRS Fund because such reimbursement is used to subsidize Sorenson's practices of: (1) "blocking" calls, (2) restricting its customers' access to other VRS providers, (3) violating the FCC's rules and the ADA, and (4) providing its customers free equipment.¹³² These claims are without merit.

As explained above, Sorenson's integration of the VP-100 with its service does not prevent its customers from accessing any other VRS providers; Sorenson's customers are free to use the VRS of any other provider. Callers can also access Sorenson's interpreters by using other video devices, such as the i2eye. Likewise, Sorenson does not violate section 225 or the FCC's regulations implementing that section. In seeking reimbursement from the Interstate TRS Fund, Sorenson submits to NECA the same cost data as every other VRS provider, in full compliance with NECA's guidelines. NECA has never found Sorenson's data to be improper or to include cost categories that were not proper for reimbursement. Finally, Sorenson receives the same per-minute reimbursement rate for its services as all other VRS providers. Thus, there is no basis for arguing that Sorenson is receiving improper reimbursement from the Interstate TRS Fund.

D. Other Legal Arguments Raised Against Sorenson Are Without Merit

Other legal arguments raised in this proceeding against Sorenson are even more flimsy than those rebutted above. For example, several parties claim that the statutory goal, set forth in section 1 of the Act,¹³³ of establishing a "rapid, efficient, nationwide, and world-wide wire and radio communication service" that is "available, so far as possible, to all the people of the United

Moreover, the fact that Sorenson's VP-100 is integrated with its service does not diminish the rapidity or efficiency of our nation's communications system. To the contrary, Sorenson's service is an industry leader in terms of its rapidity and efficiency. In any event, concerns regarding Sorenson's speed-of-answer are misplaced. *See* Coalition Petition at 18; CSD Comments at 27; CSD Oct. 19 *ex parte*, Att. at 2-3. When the Coalition Petition was filed, VRS providers were not subject to any speed-of-answer requirements. The Commission subsequently adopted a speed-of-answer rule, phased in starting January 1, 2006. 47 C.F.R. § 64.604(b)(2)(iii). Sorenson is complying with that rule, as are (presumably) other VRS providers.

¹³² CSD Reply Comments at 15-19; Alexander Graham Bell Comments at 2; Gjerdingen Comments at 9-10; Hands On Reply Comments at 9-10; CSD Oct. 19 *ex parte* Att. at 2; TDI *et al.* Oct. 27 *ex parte* at 1; CSD June 17 *ex parte*, Att. at 4. The fact that other vendors have chosen to provide end users with equipment or software (*see* CSD Reply Comments at 17) is not an indictment of Sorenson. If anything, it shows how competition benefits consumers.

¹³³ 47 U.S.C. § 151.

States” requires the Commission to compel Sorenson to separate the VP-100 from other aspects of Sorenson’s total service.¹³⁴ These parties conveniently ignore the facts that: (1) Sorenson’s service already is available to any person who wants to subscribe to it; (2) no Sorenson subscriber is restricted from using the service of another VRS provider; and (3) the advent of Sorenson’s service has dramatically increased the availability to a rapid, efficient, and nationwide communication service to a previously underserved segment of the population. Equally lacking in merit are the claims, unsupported by any precedent, that Sorenson has violated the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act of 1914, and has somehow conspired to defraud the U.S. government to boot.¹³⁵

Further, while it is true, as Hands On points out, that patent holders can license use by other providers to recoup investments,¹³⁶ they are not required to do so. Sorenson has chosen to recoup its investments by offering the VP-100 as part of its total service. The fact that Sorenson has chosen not to license the VP-100 is of no legal consequence.¹³⁷ Equally lacking in merit is Hands On’s claim that the VoIP 911 Order supports a ban on blocking consumer access to competitors.¹³⁸ That order, by its terms, does not apply to VRS providers.¹³⁹ Finally, contrary to one provider’s claim, Sorenson complies fully with the Commission’s recently adopted network neutrality principles.¹⁴⁰

¹³⁴ See TDI/DHHCAN Comments at 7; CSD Comments at 2; Coalition Petition at 23-24.

¹³⁵ Gjerdingen Comments at 6-7; Gjerdingen Reply Comments at 17-18.

¹³⁶ See Hands On Nov. 11 *ex parte* at 15; CSD Reply Comments at 17-19 (describing “various alternatives” by which Sorenson could recoup its investment).

¹³⁷ Also of no legal consequence are the claims that Sorenson may have already recouped its investment in the VP-100, that Sorenson “had no idea it would provide VRS” when it began developing the VP-100, or that Sorenson’s investment in the VP-100 was “minor” compared to other investments. Reply Comments of the California Coalition of Agencies Serving the Deaf and Hard of Hearing at 8 (May 2, 2005); Hands On Reply Comments at 9; Hands On Nov. 11 *ex parte* at 9, 11. Companies that make poor investment decisions can expect to lose all or most of their investment. By contrast, companies that make good investments are entitled not only to recoup their up-front costs, but to make a profit. Sorenson should not be punished for having had the foresight to invest in a successful product, nor should the wisdom of that decision be questioned because Sorenson allegedly began to develop the product for other purposes.

¹³⁸ Hands On Nov. 11 *ex parte* at 5.

¹³⁹ *IP-Enabled Services; E911 Requirements for IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 23 & n.70 (2005).

¹⁴⁰ Hamilton Dec. 2 *ex parte* at 2; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005) (“Policy Statement”) (adopting network neutrality principles). Contrary to Hamilton’s claim, Sorenson does not violate the Policy Statement by restricting its customers’ ability to access the lawful Internet content of their choice, or their ability to run applications and use services of their choice. As explained above, Sorenson’s customers are free to use their broadband service to access any non-Sorenson Internet-based service or application they choose, including those offered by competing VRS providers.

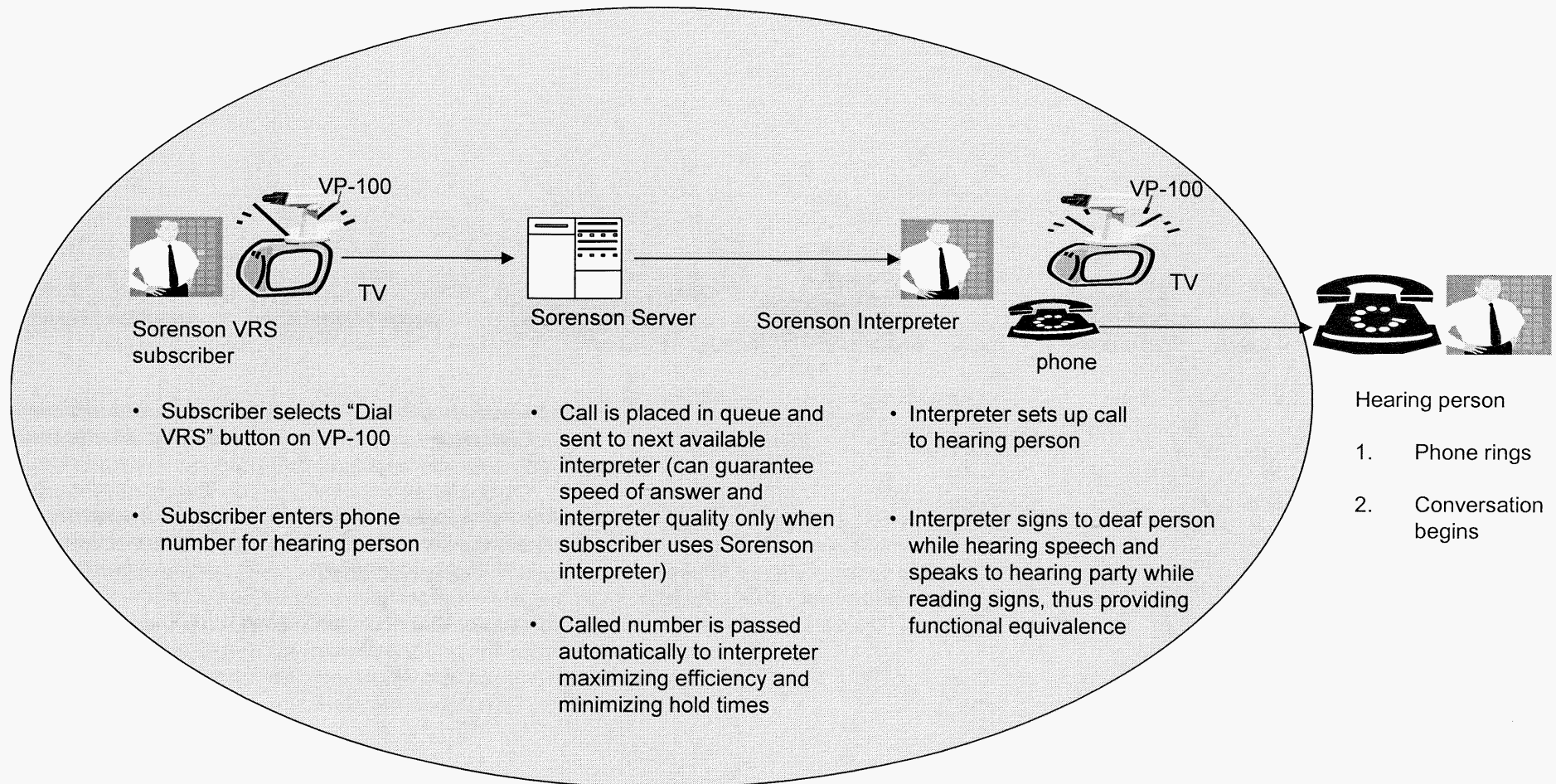
VII. CONCLUSION

As explained above, by developing the VP-100 and offering it as part of its total service, Sorenson has greatly improved the quality of life and safety of deaf and hard-of-hearing consumers, and encouraged its competitors to introduce their own innovations. The purpose of section 225 would not be advanced if Sorenson were required to unbundle its platform and permit its customers to use the VP-100 to place calls via other VRS providers. Consequently, the FCC may not rely on section 225 as its authority to impose regulations on hardware and software.

ATTACHMENTS

Diagram 1

DEAF VP-100 USER USES SORENSON INTERPRETER TO CONNECT A DEAF CALLER TO A HEARING PARTY CREATING A COMMUNICATION THAT IS FUNCTIONALLY EQUIVALENT TO A HEARING-TO-HEARING CALL



↑
SORENSON'S VRS PLATFORM (Integrated, bundled solution providing access functionally equivalent to hearing-to-hearing communication)

Diagram 2

MICROMANAGING REGULATION OF HARDWARE AND SOFTWARE WOULD FORCE UNBUNDLING OF SORENSON PLATFORM

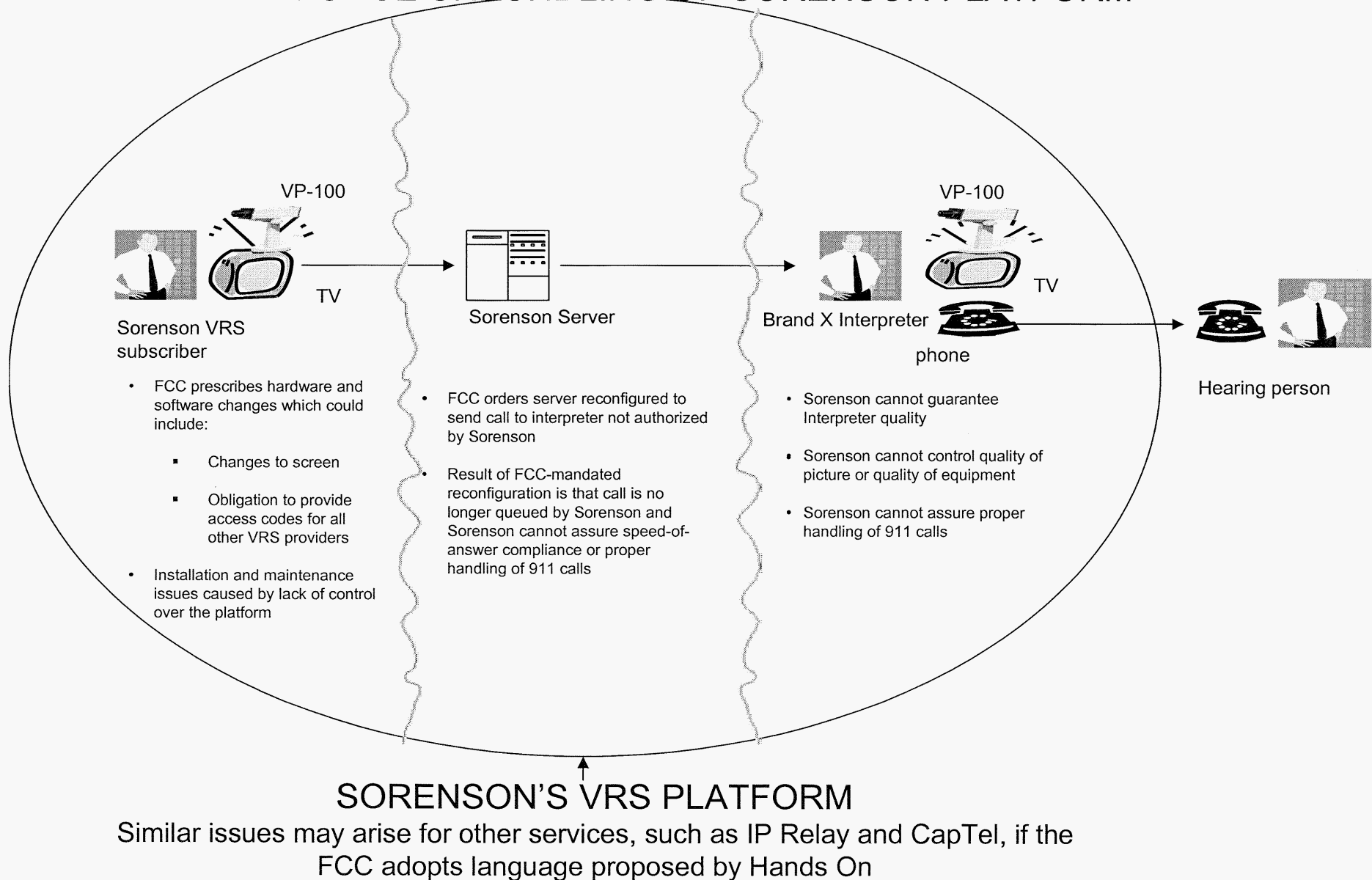


Diagram 3

SCENARIO ONE: SORENSON INTERPRETER SETS UP A CALL AT THE REQUEST OF A HEARING PERSON

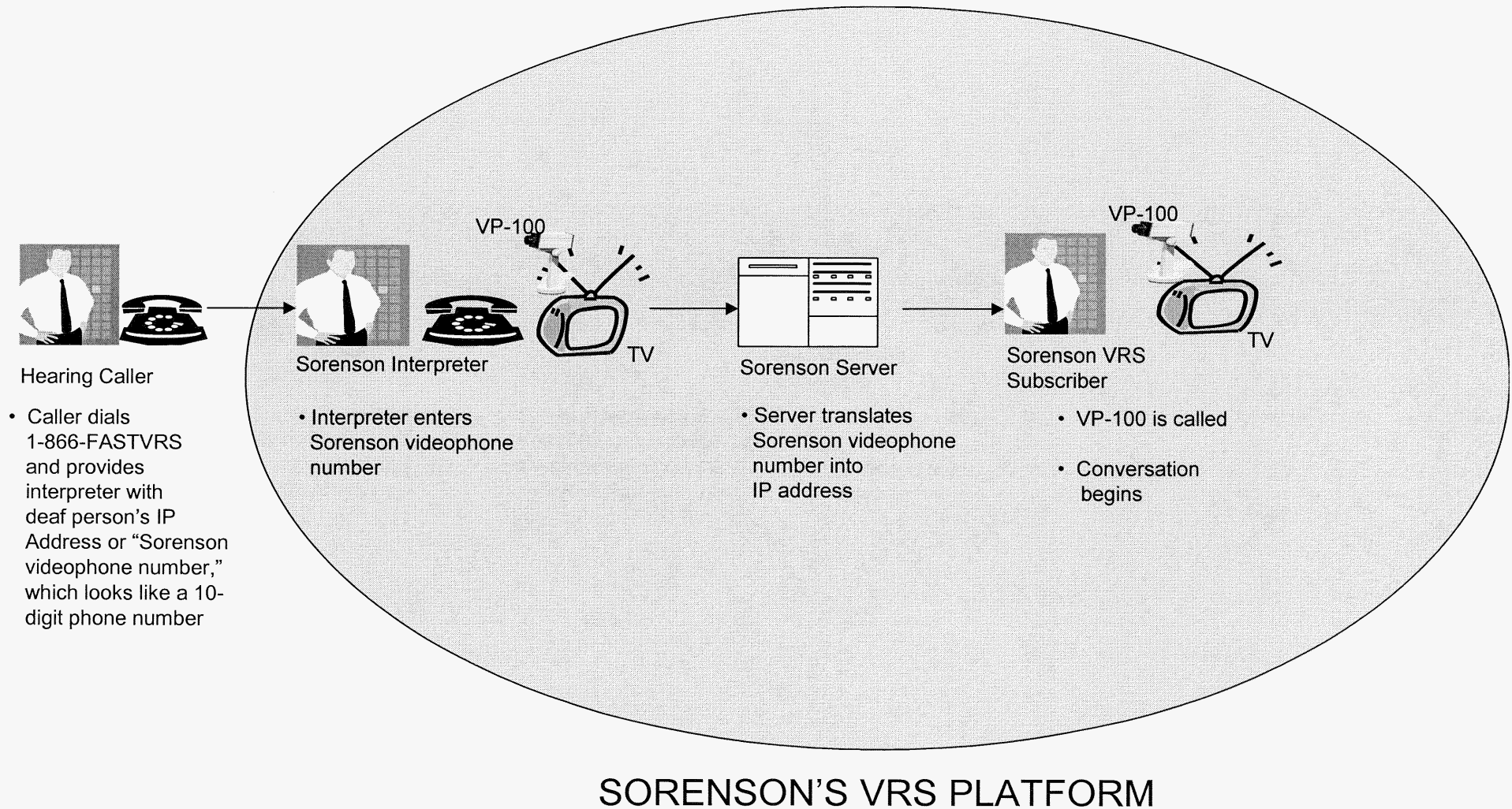
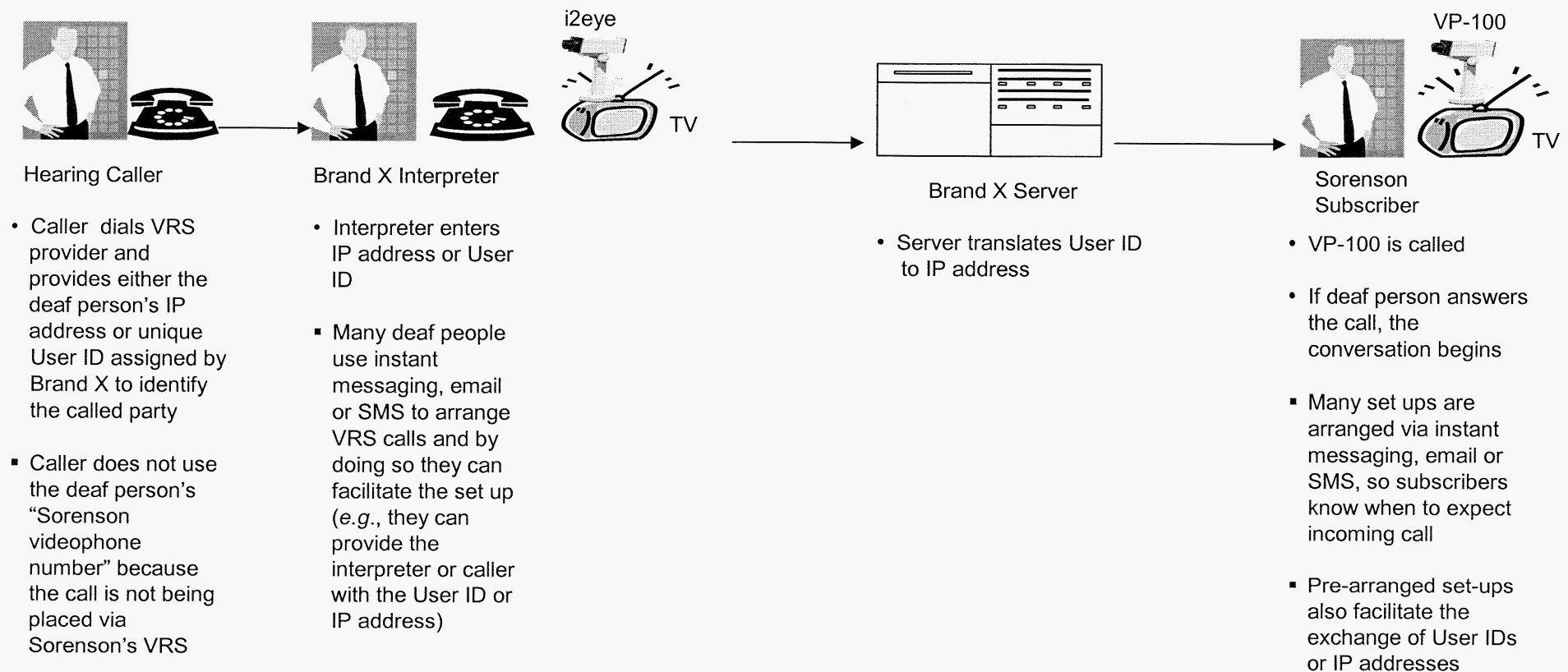


Diagram 4

SCENARIO TWO: HEARING PERSON USES A NON-SORENSEN (“BRAND X”) INTERPRETER TO SET UP A CONNECTION TO A DEAF PERSON USING SORENSON EQUIPMENT



SORENSEN RECEIVES NO COMPENSATION FOR THESE CALLS

Diagram 5

SCENARIO THREE: HEARING PERSON USES “BRAND X” VRS TO SET UP A CONNECTION BETWEEN HEARING CALLER AND DEAF VRS USER

